APPENDIX TABLE OF CONTENTS

Page

OPINION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA (DECEMBER 8, 1995) 1a

AMENDED FINAL JUDGMENT (MAY 25, 1994)..... 2a

ORDER OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA (JANUARY 17, 1996)..... 4a

MOTION OF DEFENDANT OWENS-CORNING FIBERGLAS CORPORATION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL, OR IN THE ALTERNATIVE, FOR REMITTITUR OF THE AWARD OF DAMAGES 5a

OCF'S MOTION FOR REHEARING EN BANC.....12a

OCF'S MOTION FOR CLARIFICATION AND/OR CERTIFICATION.....15a

OCF'S MOTION TO STAY MANDATE.....19a

INITIAL BRIEF OF APPELLANT OCF.....21a

REPLY BRIEF OF APPELLANT OCF 99a

FLORIDA STATUTE § 768.73 (WEST 1995).....120a

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

OWENS-CORNING FIBERGLAS CORPORATION

Appellant,

v.

CLARENCE DUDLEY and GEORGIANNA DUDLEY,

Appellees.

Case No. 94-02059

Opinion filed December 8, 1995

Appeal from the Circuit Court for Hillsborough County; Thomas A. Miller, Sr., Judge

Crosby, Saad, Beebe & Crump Mobile, Alabama, and Steven R. Berger of Berger & Chafetz, Miami, for Appellant.

John F. Venable of Venable and Venable, P.A., Tampa, for Appellees.

PER CURIAM

Affirmed.

FRANK, A.C.J., and PATTERSON and WHATLEY, JJ. Concur.

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY STATE OF FLORIDA CIVIL DIVISION

CLARENCE DUDLEY and GEORGIANNA DUDLEY, his wife

Plaintiffs, CASE NO: 93-9601

vs. ASBESTOS LITIGATION

OWENS-CORNING FIBERGLAS CORPORATION,

Defendants.

_____/

AMENDED FINAL JUDGMENT

Pursuant to the verdict rendered in this action

IT IS ADJUDGED as follows:

1. Plaintiff Clarence Dudley shall recover from Defendant Owens-Corning Fiberglas Corporation the sum of $2,614,670.00 (Two million six hundred fourteen thousand six hundred seventy and 00/100 Dollars) as compensatory damages, that shall bear interest at the rate of 12% a year for which let execution issue.

2. Plaintiff Georgianna Dudley shall recover from Defendant Owens-Corning Fiberglas Corporation the sum of $1,437,130.00 (One million four hundred thirty-seven thousand one hundred thirty and 00/100 Dollars) as compensatory damages, that shall bear interest at the rate of 12% a year for which let execution issue.

3. Plaintiff Clarence Dudley shall recover from Defendant Owens-Corning Fiberglas Corporation the sum of $5,362,500.00 (Five million three hundred sixty-two thousand five hundred and 00/100 Dollars) as punitive damages, that shall bear interest at the rate of 12% a year for which let execution issue.

4. The Public Medical Assistant Trust Fund of the State of Florida shall recover from Defendant Owens-Corning Fiberglas Corporation the sum of $2,887,500.00 (Two million eight hundred eighty-seven thousand five hundred and 00/100 Dollars) as punitive damages, that shall bear interest at the rate of 12% a year for which let execution issue.

5. Plaintiffs Clarence Dudley and Georgianna Dudley shall recover from Defendant Owens-Corning Fiberglas Corporation the sum of $3,319.85 (Three thousand three hundred nineteen and 85/100 Dollars) as costs, that shall bear interest at the rate of 12% a year for which let execution issue.

DONE AND ORDERED in Chambers, at Tampa, Hillsborough County, Florida this 25th day of May, 1994.

s/
JUDGE THOMAS MILLER

Copies furnished to:

John F. Venable, Esquire
Katherine Hill, Esquire
James Keifer, Esquire
State of Florida, Dept. of Legal Affairs, Civil Division

IN THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA
January 17, 1996

OWENS-CORNING FIBERGLAS CORPORATION, Appellant(s), vs. CLARENCE DUDLEY and GEORGIANNA DUDLEY, Appellee(s).	Case No. 94-02059

BY ORDER OF THE COURT:

Counsel for appellant having filed a motion for clarification and/or certification and motion to stay mandate in this case, upon consideration, it is

ORDERED that the motions are hereby denied. It is further

ORDERED that appellant's motion for rehearing en banc is denied as not accompanied by a motion for rehearing.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER {SEAL}

WILLIAM A. HADDAD, CLERK

c: Steven R. Berger, Esq.
Richard M. Crump, Esq.
John F. Venable, Esq.

IN THE CIRCUIT COURT
THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR
HILLSBOROUGH COUNTY, FLORIDA

CLARENCE DUDLEY and GEORGIANNA DUDLEY,	*	
Plaintiffs,	*	CIV. ACTION NO: 93-9601
vs.	*	
OWENS-CORNING FIBERGLAS CORPORATION,	*	
Defendants.	*	

_____/

MOTION OF DEFENDANT OWENS-CORNING FIBERGLAS CORPORATION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL, OR IN THE ALTERNATIVE, FOR REMITTITUR OF THE AWARD OF DAMAGES

Comes now the Defendant, Owens-Corning Fiberglas Corporation, pursuant to Rule 1.530 of the Florida Rules of Civil Procedure, and moves the Court to set aside the verdict and the judgment entered in this cause and to enter judgment notwithstanding the verdict in favor of Owens-Corning Fiberglas Corporation. Alternatively, the Defendant moves for a new trial. As a further alternative, Defendant moves for a remittitur of the award of damages by reduction of the amount of compensatory damages and/or for the elimination or reduction of punitive damages or for such other relief as

Defendant may be entitled to receive. As separate and several grounds for said separate and alternative motions, the Defendant would show the Court as follows:

1. The judgment in favor of the Plaintiff, Clarence Dudley, and against the Defendant, Owens-Corning Fiberglas Corporation, is against the manifest weight of the evidence.

2. The judgment in favor of the Plaintiff, Clarence Dudley and against the Defendant, Owens-Corning Fiberglas Corporation, is against the manifest weight of the evidence in that this case was tried on the theory of negligent failure to warn and the evidence affirmatively established that Owens-Corning Fiberglas Corporation did in fact place a warning statement on the cartons of its asbestos-containing Kaylo beginning in approximately December of 1966. The warning was revised in 1970. This warning statement continued through approximately November of 1972 when the asbestos was removed from the product. The evidence affirmatively shows that there was no requirement for a warning by the United States Government or OSHA until 1971 (approximately five (5) years after Owens-Corning Fiberglas Corporation's warning). The evidence further affirmatively shows that the content of the warning was adequate and sufficient when compared to the OSHA warning which was in evidence. There was no evidence presented to the jury upon which a determination could be made that the warning was untimely and/or inadequate, and in fact, the evidence established that the warning was both timely and adequate.

3. The judgment in favor of the plaintiff, Clarence Dudley, and against the Defendant, Owens-Corning Fiberglas Corporation, is against the manifest weight of the evidence in that this case was tried on the theory of strict liability and design defect and the evidence affirmatively established that Owens-Corning Fiberglas Corporation did not design the Kaylo product and that

the Kaylo product was not defective. There was no evidence presented to the jury upon which a determination could be made that Owens-Corning Fiberglas Corporation designed the Kaylo product or that the Kaylo product was defective.

4. The Court erred in failing to grant Owens-Corning's Motion to Strike Punitive Damages and Motion in Limine as to Punitive Damages, where it was apparent that no legal basis existed for the imposition of punitive damages and the imposition of any punitive damages would violate the United States Constitution. The content of those motions is incorporated herein.

5. Plaintiff's counsel failed to introduce any evidence from which the jury could conclude by a preponderance of the evidence that Clarence Dudley was exposed to asbestos-containing insulation products manufactured by this Defendant in such an amount as to be injurious to his health.

6. It is affirmatively appeared from the evidence that, to the extent that Clarence Dudley's health has been damaged by exposure to asbestos, which Defendant denies, such damage was caused by exposure to asbestos-containing insulation products manufactured, sold and distributed by other Defendants and parties not Defendants to this action and/or by the negligence of others including, but not limited to, plaintiff's employer and was not caused by this Defendant. As such Defendant maintains that the trial court erred in failing to give a Fabre instruction and further erred in failing to include co-defendants, other manufacturers not defendants to this action, and other parties, including but not limited to, the plaintiff's employers, on the verdict form so that the jury could properly and accurately apportion liability in this case.

7. The verdict and jury award of damages in favor of the Plaintiff, Clarence Dudley and against the Defendant Owens-Corning Fiberglas Corporation, is

against the manifest weight of the evidence, is based upon speculative evidence, and is unjust.

8. The verdict and jury award of damages is excessive and the result of passion, prejudice, bias, sympathy, mistake, speculation or other improper motive or cause, and/or the passions of the jury were influenced by considerations outside the record.

9. The verdict and jury award of damages is excessive and the result of improper and prejudicial statements made by Plaintiffs' counsel to the jury during presentation of evidence and/or closing argument.

10. The award of compensatory damages is against the weight of evidence and is excessive under the Due Process Clause of the Fourteenth Amendment.

11. The punitive damages award is presumptively excessive under Florida law. The Legislature has made clear that "the judgment for the total amount of punitive damages awarded to a claimant shall not exceed three times that amount of compensatory damages. . .." § 768.73(1)(a), Fla. Stat. (1993) (emphasis added). Where punitive damages exceed this, "the award is presumed to be excessive and the defendant shall be entitled to remittitur of the amount in excess of the limitation unless the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive. . .." § 768.73(1)(b), Fla. Stat. (1993) (emphasis added).

12. The excessiveness of the punitive damages award indicates the jury's failure to render a proper verdict. The verdict does not bear a reasonable relationship to the amount of damages proved and the injury suffered. The verdict is against the manifest weight of the evidence and appears to have been rendered under the influence of mistake, prejudice, passion, sympathy, speculation, or other improper motive or consideration on the part of the jury.

13. The punitive damage award is excessive under the Constitution of the United States, and its imposition violates the Eighth Amendment and Due Process Clause of the Fourteenth Amendment.

14. The punitive damage award deprives Owens-Corning of its constitutional right of access to the courts under the First Amendment and the Due Process Clause of the Fourteenth Amendment.

15. The imposition of a punitive damage award violates the Due Process Clause of the Fourteenth Amendment because the record does not establish an intent to injure sufficient to sustain the verdict.

16. Any award of punitive damages against Owens-Corning at this stage of the asbestos litigation is unnecessary and violative of the Excessive Fines Clause of the Eighth Amendment of the United States Constitution.

17. The Court committed reversible error in failing to sustain Defendant's objections based on materiality, relevance, and form and the Court allowed impermissible evidence to reach the jury.

18. The jury was improperly instructed on the law. The Court erred in denying Defendants' requested jury instructions as set out and argued by defendant during the charge conference and erred in giving certain of the plaintiff's requested jury instructions which were objected to by Defendant specifically during the charge conference. Defendant adopts by reference all arguments made at the charge conference.

19. The Court committed reversible error in refusing to grant defendant a continuance of one day to allow a witness to be present and in refusing to allow the defendant to read the trial testimony of Mr. Jerry Helser given in trials in which this defendant and plaintiff's counsel were involved before this Court within the last several months.

20. The Court committed reversible error in overruling certain objections made by the defendant to the use of the John Thomas deposition and also erred in overruling objections to certain designated portions therein.

21. The verdict is palpably wrong and manifestly unjust.

22. The verdict fails to do substantial justice.

23. The verdict is contrary to the law.

24. The verdict is contrary to the evidence presented.

25. The verdict is insufficient to support the verdict.

26. The verdict was such that there was no issue of fact as to which reasonable men could differ.

WHEREFORE, premises considered, the Defendant, Owens-Corning Fiberglas Corporation, prays that this Court will grant its motion for judgment notwithstanding the verdict, or, in the alternative, a new trial, or, in the alternative, a remittitur of the award of damages and grant the Defendant such other, further and different relief to which it may be entitled.

Respectfully submitted,

CROSBY, SAAD, BEEBE,
CAVENDER &
CRUMP, P.C.
Attorneys for OWENS-
CORNING FIBERGLAS
CORPORATION

By: s/
RICHARD M. CRUMP
Florida Bar No. 382930
Post Office Drawer 850249
Mobile, AL 36685
(205) 476-3000

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 6th day of May, 1994, served a copy of the foregoing pleading to John F. Venable, Esquire, Tampa Bay Marina Center, 205 S. Hoover Blvd., Suite 403, Tampa, Florida 33609 and United States Mail properly addressed and first class postage prepaid.

s/
RICHARD M. CRUMP

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

OWENS-CORNING FIBERGLAS CORPORATION,	Case 94-02059
Appellant,	Lower Tribunal Case No. 93-9601
vs.	
CLARENCE DUDLEY and GEORGIANNA DUDLEY,	Florida Bar No. 117402
Appellees.	

MOTION FOR REHEARING EN BANC

COMES NOW, the Appellant, OWENS-CORNING FIBERGLAS CORPORATION, by and through its undersigned counsel, and pursuant to Rule 9.331(d), **Fla.R.App.P.**, moves this Honorable Court for rehearing en banc, and states:

1. This is an appeal from an amended final judgment which included a punitive damage award in the aggregate amount of $8,250,000.00. Punitive damages were awarded by the jury for alleged acts or omissions which occurred more than 25 years ago and which have been the subject of massive and repeated awards of punitive damages throughout the country.

2. Appellant presented two constitutional issues: (1) whether the Excessive Fines Clause of the Eighth Amendment to the United States Constitution was implicated by virtue of Section 768.73, **Fla.Stat.**, as suggested in *Browning-Ferris Indus. of Vt., Inc. vs. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) and *Pacific Mut. Life Ins. Co. vs. Haislip*, 499 U.S. 1 (1991), and (2) whether Appellant's due process rights under the United States and Florida Constitutions are being

violated by repeated, massive and unrelenting awards of punitive damages for the same course of conduct.

3. The panel chose to affirm the judgment in all respects with a "PCA" dated December 8, 1995. Although Appellant does not agree with the panel's decision, Appellant will not violate the letter or spirit of Rule 9.330 and reargue those matters already presented to the panel.

4. However, the implications of the Eighth Amendment by virtue of Section 768.73, **Fla.Stat.**, is a significant issue of exceptional importance in light of the staggering impact of massive awards of punitive damages not only against this Appellant but as against other defendants in mass tort litigation who may be similarly situated.

5. Furthermore, Appellant raised due process arguments under several federal and state decisions. Appellant took note of the Florida Supreme Court's decision in *W.R. Grace & Co.-Conn. vs. Waters*, 638 So.2d 502 (Fla. 1994), that the Appellant in that case was premature in its reliance on *Pacific Mut. Life Ins. Co. vs. Haislip*, 499 U.S. 1 (1991). The Florida Supreme Court suggested that the issue was premature for a variety of reasons but invited a future due process argument "based on the cumulative effect of prior awards of punitive damages." 638 So.2d at 506.

6. Consequently, the Florida Supreme Court has already recognized the exceptional importance of this issue and has invited further review in the proper case. Appellant submits that this is the proper case. Appellant has filed a Motion to certify the issue to the Florida Supreme Court but further suggests that rehearing en banc would allow this Court to address this exceptionally important matter.

7. In accord with Rule 9.331(d)(2):

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of

exceptional importance.

s/_____
Steven R. Berger, Attorney for Appellant
Florida Bar No. 117402

8. Significantly, a different panel of this Court has already questioned the "fundamental fairness" of repetitive imposition of punitive damages on corporations for conduct occurring many years in the past. *Baione vs. Owens-Illinois, Inc.*, 599 So.2d 1377, 1380 (Fla. 2d DCA 1992).

WHEREFORE, Appellant, OWENS-CORNING FIBERGLAS CORPORATION, respectfully requests this Honorable Court to grant rehearing en banc to address the exceptionally important constitutional issue raised by Appellant.

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 22nd day of December, 1995, to **John F. Venable, Esquire,** 205 South Hoover Boulevard, Suite 403, Tampa, Florida 33609.

BERGER & CHAFETZ
Appellate Counsel for OCF
Suite 1500
NationsBank Building
9350 South Dixie Highway
Miami, Florida 33156

By: s/_____
Steven R. Berger

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

OWENS-CORNING FIBERGLAS CORPORATION,

Appellant,

vs.

CLARENCE DUDLEY and GEORGIANNA DUDLEY,

Appellees.

Case 94-02059

Lower Tribunal Case No. 93-9601

MOTION FOR CLARIFICATION AND/OR CERTIFICATION

COMES NOW, the Appellant, OWENS-CORNING FIBERGLAS CORPORATION, by and through its undersigned counsel, and pursuant to Rule 9.330(d), **Fla.R.App.P.**, moves this Honorable Court for clarification and/or certification, and alleges:

1. By decision dated December 8, 1995, this Court affirmed the judgment sought to be reviewed by the Appellant which said judgment included awards of both compensatory and punitive damages.

2. Although Appellant does not agree with this Court's decision, it is not the office of a Motion for Rehearing to reargue the merits of this Court's decision. Consequently, in accord with the letter and spirit of Rule 9.330(a), **Fla.R.App.P.**, Appellant will not now separately address the issues which have already been argued in the briefs and at oral argument.

3. Two of the issues raised by Appellant involved the constitutionality of further punitive damage awards against Appellant in light of the significant and continuing number of awards of punitive damages for

the same course of conduct. Appellant argued that continued imposition of punitive damage awards against it violates the Eighth Amendment to the United States Constitution and that further awards of punitive damages violates concepts of due process under the United States and Florida Constitutions.

4. By rendering a "PCA" this Court has given no guidance to the bench or bar in relation to the constitutional arguments raised by Appellant. This Court, of course, is under no obligation to specifically address issues raised in an appeal but Appellant suggests that the nature of the issues, coupled with the hundreds of millions of dollars at stake as to this Appellant and other parties similarly situated, would warrant a discussion of Eighth Amendment and due process arguments.

5. Consequently, Applicant respectfully requests this Court to clarify its "PCA" and provide some guidance to the bench and bar, as well as possible guidance for further review in this case, with reference to the significant constitutional issues raised by Appellant. Having recognized that Rule 9.330 precludes reargument, Appellant would merely point out that *Browning-Ferris Indus. of Vt., Inc. vs. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) and *Pacific Mut. Life Ins. Co. vs. Haislip*, 499 U.S. 1 (1991), among other decisions, have indicated that the Eighth Amendment is implicated by virtue of a statutory scheme such as that formerly contained in Section 768.73, **Fla. Stat.** For purposes of possible review by the United States Supreme Court it would be useful for this Court to explain why it believes that the Eighth Amendment is not implicated in the instant case or, if it is implicated, why it is not dispositive.

6. Appellant has also argued that its due process rights under the United States and Florida Constitutions have been violated and continue to be violated by repetitive, massive imposition of punitive damages for the same course of conduct which ceased approximately 25 years ago. The specific cases upon which Appellant

relied, both federal and state, are contained in the initial brief, the reply brief and the supplemental authority submitted to this court.

7. Specifically, however, the Florida Supreme Court in *W.R. Grace & Co.-Conn. vs. Waters*, 638 So.2d 502 (Fla. 1994) invited a due process argument, based on the "cumulative effect of prior awards" of punitive damages in some later case. *Id.* at 506. In essence, the Florida Supreme Court was inviting the submission of the due process arguments at some later appropriate time. Appellant believes that the instant case squarely presents the issue left unanswered by the *Waters* decision and that this Court should clarify its "PCA" to indicate reasons why it has rejected the due process arguments raised by Appellants.

8. Furthermore, to the extent that the Florida Supreme Court invited a future due process challenge, Applicant believes that the clarification of this Court's decision would allow further review by the Florida Supreme Court. Alternatively, in light of the Supreme Court's invitation for future consideration of a due process argument under the circumstances, Appellant respectfully suggests that the issue left unanswered in *Waters* should be certified to the Florida Supreme Court to allow the Court to address the unanswered question.

WHEREFORE, Appellant, OWENS-CORNING FIBERGLAS CORPORATION, respectfully requests this Honorable Court to clarify its decision affirming the judgment sought to be reviewed and/or certifying the due process issue to the Florida Supreme Court as contemplated in *W.R. Grace & Co.-Conn. vs. Waters*, 638 So.2d 502, 506 (Fla. 1994).

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 22nd day of December, 1995, to **John F. Venable, Esquire,** 205 South Hoover Boulevard, Suite 403, Tampa, Florida 33609.

BERGER & CHAFETZ
Appellate Counsel for OCF
Suite 1500
NationsBank Building
9350 South Dixie Highway
Miami, Florida 33156

By: s/
Steven R. Berger
Florida Bar No. 117402

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

OWENS-CORNING FIBERGLAS CORPORATION,	Case 94-02059
Appellant,	Lower Tribunal Case No. 93-9601
vs.	
CLARENCE DUDLEY and GEORGIANNA DUDLEY,	Florida Bar No. 117402
Appellees.	

MOTION TO STAY MANDATE

COMES NOW, the Appellant, OWENS-CORNING FIBERGLAS CORPORATION, by and through its undersigned counsel, and pursuant to Rule 9.310, **Fla.R.App.P.**, moves this Honorable Court to stay the issuance of mandate, and states:

1. Concurrently herewith, Appellant has filed a Motion for Rehearing En Banc and a Motion for Clarification and/or Certification. Pursuant to Rule 9.310(e), **Fla.R.App.P.**, stay of execution on the judgment remains in effect during the pendency of all review proceedings in Florida courts until a mandate issues, or unless otherwise modified or vacated.

2. In the event that this Court grants rehearing en banc, clarification and/or certification, Appellant respectfully submits that the stay will continue in effect until conclusion of any proceedings resulting therefrom but that, in any event, mandate should be withheld pending determination of any such proceedings in order to prevent execution on the judgment. Good and sufficient supersedeas bond in more than ample amounts has been posted as required by Rule 9.310(b).

3. In the event that this Court does not grant rehearing en banc, clarification and/or certification, Appellant respectfully requests that this Court enter an order staying the issuance of mandate for a period of 60 days to allow Appellant to seek a stay of execution from the United States Supreme Court conditioned on the filing of a Petition for Writ of Certiorari in that Court. As Appellant has already pointed out to this Court by way of notices of supplemental authority, the United States Supreme Court has, on at least two recent occasions, granted stays of execution of punitive damage portions of judgments against this Appellant in cases arising in other jurisdictions, in order to allow consideration of the constitutional issues raised by Appellant.

WHEREFORE, Appellant, OWENS-CORNING FIBERGLAS CORPORATION, respectfully requests this Honorable Court to withhold the issuance of mandate pending all review in Florida appellate courts and, if such other review is not possible, to stay the issuance of mandate and continue the stay of execution under the pending supersedeas bond for a period of 60 days to allow Appellant to seek a stay of execution from the United States Supreme Court.

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 22nd day of December, 1995, to **John F. Venable, Esquire,** 205 South Hoover Boulevard, Suite 403, Tampa, Florida 33609.

BERGER & CHAFETZ
Appellate Counsel for OCF
Suite 1500
NationsBank Building
9350 South Dixie Highway
Miami, Florida 33156

By: s/
Steven R. Berger

IN THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT OF FLORIDA

CASE NO. 94-02059

Lower Tribunal Case No. 93-9601

OWENS-CORNING FIBERGLAS CORPORATION,
Appellant,

v.

CLARENCE DUDLEY and GEORGIANNA DUDLEY,
Appellees.

INITIAL BRIEF OF APPELLANT

CROSBY, SAAD, BEEBE
& CRUMP
Post Office Drawer 850249
Mobile, Alabama 36685
-AND-
STEVEN R. BERGER, ESQ.
BERGER & CHAFETZ
Attorneys for OCF
Suite 1500, NationsBank Building
9350 South Dixie Highway
Miami, Florida 33156
Florida Bar No. 117402

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

INTRODUCTION 1

STATEMENT OF CASE 2

STATEMENT OF FACT 4

SUMMARY OF THE ARGUMENT 7

ARGUMENT

POINT I. WHERE THERE IS EVIDENCE THAT NEGLIGENCE OF NON-PARTIES SUBSTANTIALLY CONTRIBUTED TO A PLAINTIFF'S INJURIES, THE TRIAL COURT ERRS IN REFUSING TO ALLOW THE JURY TO CONSIDER THE NEGLIGENCE OF THE NON-PARTIES AND IN FAILING TO INCLUDE THEM ON THE VERDICT FORM. 10

POINT II. WHERE A WITNESS IS SHOWN TO BE INCOMPETENT, HIS TESTIMONY SHOULD NOT BE ADMITTED; ALTERNATIVELY, EVEN IF A WITNESS IS MARGINALLY COMPETENT TO TESTIFY, *ARGUENDO*, IF THE PREJUDICIAL EFFECT OF HIS TESTIMONY WILL OUTWEIGH THE PROBATIVE VALUE, IT SHOULD BE EXCLUDED FROM JURY CONSIDERATION. 12

Page(s)

POINT III. THE COURT ERRED IN REFUSING TO CONTINUE THE TRIAL FOR ONE DAY TO ALLOW OCF TO PRESENT CRITICAL TESTIMONY OR, ALTERNATIVELY, IN REFUSING TO ALLOW OCF TO USE A TRANSCRIPT OF THE WITNESS'S TESTIMONY FROM A PRIOR TRIAL. 17

POINT IV. THE PUNITIVE DAMAGE AWARD IMPOSED AGAINST OCF VIOLATES THE EXCESSIVE FINES CLAUSE OF THE UNITED STATES CONSTITUTION AS A MATTER OF LAW. 21

A. The Excessive Fines Clause of the Eighth Amendment Imposes Limitations on Punitive Damage Awards When the State Has a Right to Recover a Share of the Damages Awarded. 21

1. Punitive Damages Assessed in Florida Courts Pursuant to Florida Statute Section 768.73 Are Monetary Punishments Subject to Constitutional Limitation by the Excessive Fines Clause of the Eighth Amendment. 23

B. The History of the Excessive Fines Clause Informs the Standard for Evaluating the Constitutionality of Excessive Monetary Punishments. 26

1. The Monetary Punishments Imposed Against OCF in the Form of Punitive Damages Violate the Excessive Fines Clause Because These Punishments

Page(s)

are Disproportionate to Any Wrong Committed by OCF. 32

a. Further Punitive Damage Awards Against OCF Would be Wholly Disproportionate to the Gravity of OCF's Alleged Wrongdoing. 33

b. The Punishment Imposed Against OCF in the Form of Punitive Damages is Wholly Disproportionate to any Profits Gained by OCF Through its Alleged Course of Wrongful Activity. 34

c. The Award of Punitive Damages Against OCF Bears No Relationship to Criminal Penalties for Like Conduct in Florida. 34

2. The Excessive Fines Clause at a Minimum Prohibits Repetitive Monetary Punishments for a Single Course of Tortuous Conduct that Threatens Eventually to Deprive a Corporate Defendant Such as OCF of the Ability to Conduct its Business. 37

POINT V. FUNDAMENTAL CONCEPTS OF DUE PROCESS AND FLORIDA LAW FORBID THE IMPOSITION OF FURTHER PUNITIVE DAMAGES AGAINST OCF AS PUNISHMENT FOR OCF'S PRODUCTION AND SALE OF KAYLO OVER 20 YEARS AGO. 40

Page(s)

A. Repetitive Punishments Imposed Against OCF for a Single Course of Conduct Serve No Legitimate Deterrent or Punitive Purpose 41

B. The Passage of Nearly Two Decades Since OCF's Allegedly Tortuous Conduct Extinguishes Any Remaining State Interest in Punishing OCF 45

C. The Punitive Award is Excessive Because OCF Complied With Existing Government and Industry Safety Standards 47

CONCLUSION 50

CERTIFICATE OF SERVICE 50

TABLE OF AUTHORITIES

Case	Page(s)
Adams v. Armstrong World Indus., Nos. 86-C-763, et al. (W. Va. Cir. Ct., Monongolia County 1990)	42
Adams vs. Wood, 6 U.S. (2 Cranch) 336 (1805)	46
Aetna Life Insurance Co. vs. Lavoie, 475 U.S. 813 (1986)	21
Allied Signal, Inc. vs. Fox, 623 So. 2d 1180 (Fla. 1993)	10, 11
Alexander vs. United States, 113 S. Ct. 2766 (1993)	21
Amos vs. Gunn, 84 Fla. 285, 94 So. 615 (1922)	39
Arab Termite & Pest Control, Inc. vs. Jenkins, 409 So. 2d 1039 (Fla. 1982)	37
Armstrong vs. Keene Corp., No. 88208502 (Md. Cir. Ct. Baltimore City, July 26, 1989)	43
Austin vs. United States, 113 S. Ct. 2801 (19993)	21
A. W. Chesterton Vs. Fisher, 19 FLW D2113 (Fal. 3d DCA, October 5, 1994)	11
Barnes v. Armstrong World, Inc., No. 86-C-763, et al. (W. Va. Cir. Ct., Monongalia County 1990)	42
Bell vs. Morrison, 26 U.S. (1 Pet.) 351	46
Berry v. Celotex Corp., Nos. 83-L-11989, 85-L-1 1170 (Ill. Cir. Ct., Cook County 1987)	42
Bill Terry's, Inc. vs. Atlantic Motor Sales, Inc., 409 So. 2d 508 (Fla. 1st DCA 1982)	45

Browning Ferris Indus. of Vt., Inc. vs. Kelco Disposal, Inc., 492 U.S. 257 (1989) 21, 22, 23, 24, 27, 31

Campbell v. Combustion Eng'g, slip op., No. 92 CV 405 (Colo. Dist. Ct. July 20, 1992) 41

Celotex Corp. vs. Pickett, 459 So. 2d 375 (Fla. 1st DCA 1984), *approved*, 490 So.2d 35 (Fla. 1986) 37

Chavigny vs. State, 112 So.2d 910, 915 (Fal. 2d DCA) *cert. denied*, 114 So. 2d 6 (Fla. 1959) *cert denied*, 362 U.S. 922 (1960) 39

Chrysler Corp. vs. Wolmer, 499 So. 2d 823 (Fal. 1986)

Clementson vs. Williams, 12 U.S. (8 Cranch) 72 (1814) 46

Clinton vs. State, 53 Fla. 98, 43 So. 312 (1907) 15

Crane vs. Owens-Corning Fiberglas, Case No. 92-20924-42 (11th Judicial Circuit, Date County, Florida) 43

Cutler vs. Pelletier, 507 So. 2d 676 (Fla 4th DCA), review denied, 518 So. 2d 1277 (Fla. 1987) 45

Dewitt Excavating, Inc. vs. Walters, 642 So. 2d 833 (Fla. 5th DCA 1994) 11

Drabik vs. Stanley-Bostitch, Inc., 997 F.2d 496 (8th Cir. 1993) 48

Dunn v. Owens-Corning Fiberglas Corp., 774 F. Supp. 929 (D.I.V. 1991) 42

Dunn vs. Hovic, 1 F.3d 1371 (3d Cir. 1993), cert. denied, 114 S. Ct. 650 (1993) 42, 45

Edwards vs. Pratt, 335 So. 2d 597, Fla. 3d DCA 1976 18

Eger vs. State, 291 So. 2d 676 (Fla. 3d DCA 1974), *petition dismissed*, 297 So. 2d 28 (Fla. 1974) 39

East West Karate Assoc. Inc. vs. Riquelme, 638 So. 2d 604 (Fla 4th DCA 1994) 11

Fabre vs. Marin, 623 So. 2d 1182 (Fla. 1993) 10

Fisher vs. City of Miami, 172 So. 2d 455 (Fla. 1965) 37

Florida S. Ry. Co. vs. Hirst, 11 So. 506 (1892) 35

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 23

Gizzi v. Celotex Corp., et al., No. C-1-84-961 (S.D. Ohio 1987) 42

Gordon vs. State, 585 So. 2d 1033 (Fla. 3d DCA 1991) (footnote omitted), *affirmed*, 608 So. 2d800 (Fla. 1992), *cert. denied*, 113 S. Ct. 1647 (1993) 25

Gravina v. Owens-Corning Fiberglas Corp., No. 90-1815-CIV-RYSKAMP (S.D. Fla. 1991) 42

Harnly vs. Watson, 519 So. 2d 18 (Fla. DCA 1988) 12

Harwell vs. Blake, 180 So. 2d 173 (Fla. 2d DCA 1965) 12

Hoell vs. Anchor Parking Co., slip op., No. 90 CV 0667 (Wis. Cir. Ct. Feb. 16, 1993) 41

Honda Motor v. Oberg, 114 S. Ct. 1331 (1994) 40

Hoy vs. Poyner, 305 So. 2d 306 (Fla. 2d DCA 1974) 37

In re Asbestos Litigation, 1992 Del. Super. LEXIS 488 (October 26, 1992) 16, 17

In re consolidated Asbestor Cases, No. 92-16334-Ca (Fla. 4th DCA 1993) 42

In re Guam Asbestor Litig. (Brennan v. Owens-Corning Fiberglas Corp. No. CV986-86 (Guam Sup. Ct. 1992) 43

In re School Asbestos Litig., 789 F.2d 996 (3d Cir.), **cert. denied**, 479 U.S. 852 **and cert. denied**, 479 U.S. 915 (1986) 44

Ingram vs. Peitit, 340 So. 2d 922 (Fla. 1976) 24, 35

International Bhd. of Elec. Workers vs. Foust, 442 U.S. 42 (1979) 23

Jadlowski v. A. C. & Sons, Inc., No. L0703-9 1 (N.J. Supp. Ct., Middlesex County 1993) 43

Jarrolt vs. Moberly, 103 U.S. (13 Otto) 580 (1881) 27

Johns-Manville Sales Corp. vs. Janssens, 463 So. 2d 242 (Fla. 1st DCA 1984) **review denied**, 647 So. 2d 999 (Fla. 1985) 37, 47

Juzwin vs. Amtorg Trading Corp., 705 F. Supp. 1053 (D.N.J.), **vacated on other grounds**, 718 F. Supp. 1233 (D.N.J. 1989) 44

Kochan vs. Owens-Corniong Fiberglas Corp., 242 Ill. App. 3d 781, 610 N.E. 683 (1993), **petition for leave to appeal denied**, 152 Ill. 561, 622 N.E. 2d 1208 (Ill. 1993), **cert. denied**, 127 L. Ed. 565 (U.S. 1994) 43

Koster v. Owens-Corning Fiberglas Corp., No. 93-CI-00302 (Ky. Cir. Ct., McCracken County, 1993) 43

La Reina Pharmacy, Inc. vs. Lopez, 453 So. 2d 882 (Fla. 3d DCA 1984) 16

Liesener v. Weslo, Inc., 775 F. Supp. 857 (D. Md. 1991) 49

Magallanes vs. Superior Court, 213 Ca. Rptr. 547 **review denied**, (Cal. July 10, 1985) 44

Maxey v. Freightliner Corp., 665 F.2d 1367 (5th Cir. 1982), **appeal on remand**. 722 F.2d 1238, **modified on other grounds**, 727 F.2d 350 (5th Cir. 1984) 49

M'Cluny vs. Silliman, 28 U.S. (3 Pet.) 270 (1830) 46

Memphis Community School Dist. vs. Stachura, 477 U.S. 299 (1986) 23

Outdoor Resorts at Orlando, Inc. vs. Hotz Management Co., Inc., 483 So. 2d 2 (Fla. 2d DCA 1985) 10, 20

Owens-Corning Fiberglas Corp. vs. Adams, 113 S. Ct. 3035 (1993) 43

Owens-Illinois, Inc. v. Armstrong, 87 Md. App. 699, 591 A.2d 544 (1991), **aff'd in part and rev'd in part**, 326 Md. 107, 604 A.2d 47, **cert. denied**, 113 S. Ct. 204 (1992) 43

Pacific Mutual Life Ins. Co. vs. Haslip, 449 U.S. (1991) 40

Pension Benefit Guar. Corp. vs. R.A. Gray & Co., 467 U.S. 717 (1984) 40

Permuy vs. Owens-Corning Fiberglas Corporation, Case No. 94-00904 3

Perper vs. Edell, 44 So. 2d 78 (Fla 1950) 16

Pickering v. Owens-Fiberglas Corp., Nos. 90- L-1546, et al. (Ill. Cir. Ct. Madison County 1992), **aff'd**, 638 N.E.2d 1127 (Ill. Ct. App. 1994) 43

Prigg vs. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) 27

Reneau v. Green, Nos. 87-L-870, et al. (Ill. Cir. Ct., Madison County 1990) 43

Richards vs. Michellin Tire Corp., 21 F.3d 1048 (11th Cir. 1994), **cert. denied**, 115 S. Ct. 902 (1995) 48

Ripa v. Keene Corp., No. L-92337-87 (N.J. Sup. Ct., Camden County 1993) 43

Rimlinger v. Johns-Manville Sales Corp., slip op., No. C-6340 (Tenn. Cir. Ct. Jan 22, 1982) 41

Robinson v. California, 370 U.S. 660 (1962) 21

Robinson vs. Gerard, 611 So. 2d 605 (Fla. 1st DCA 1993) 12

Robinson vs. State, 561 So. 2d 419 (Fla. 1st DCA 1990) 19

Roginsky vs. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967) 41

Rosenbloom vs. Metromedia, Inc., 403 U.S. 29, 82 (1971) 24

Schiavo v. GAF Corp., No. L-07636-88 (N.J. Sup. Ct., Camden County 1993) 43

Schilb vs. Kuebel, 404 U.S. 357 (1971) 21

Schindler Corp. vs. Ross, 625 So. 2d 94 (Fla. 3d DCA 1993) 11

Schoenian v. Owens-Corning Fiberglas Corp., No. 87-C-775-Br (W. Va. Cir. Ct., Ohio County 1989) 43

Simmons vs. Baptist Hospital of Miami, Inc., 454 So. 2d 681 (Fla. 3d DCA 1984) 16

Skadan v. Owens-Corning Fiberglas Corp., Nos. H-94314, H-89278 (N.Y. Supp. Ct., Erie County 1990) 43

Sloman vs. Tambrands, Inc., 841 F. Supp. 699 (D. Md. 1993) 49

Smith v. Owens-Corning Fiberglas Corp., No. 87-L-293 (Ill. Cir. Ct., McLean County 1993) 43

Smith vs. Wade, 461 U.S. 30, 59 (1983) 23

Solem vs. Helm, 463 U.S.27, 285-286 (1993) 27, 32, 35

Spaur v. Owens-Corning Fiberglas Corp., No. CLA-028 (Iowa Dist. Ct., Polk County 1992), **aff'd**, 510 N.W. 2d 854 (Iowa 1994) 43

St. Regis Paper Co. vs. Watson, 428 So. 2d 243 (Fla. 1983) 24, 44

Stone Man, Inc. v. Green, 435 S.E.2d 205 (Fla. 1993) 49

Thompson vs. General Motors Corp., 439 So. 2d 1012 (Fla. 2d DCA 1983) 19

Trend Setter Villas of Deer Creek vs. Villas on Green, Inc., 569 So. 2d 766 (Fla 4th DCA 1990) 45

Toussie vs. United States, 397 U.S. 112 (1970) 46

United States vs. Habig, 390 U.S. 222 (1968) 46

United States vs. Halper, 490 U.S. at 435, 447-448 (1989) 22, 39, 40

United States vs. Marion, 404 U.S. 307 (1971) 46

United States vs. Scharton, 285 U.S. 518 (1932) 46

Wackenhut Corp. vs. Canty, 359 So. 2d 430 (Fla. 1978) 37

Ward v. Celotex Corp., 479 So. 2d 294 (Fla. 1st DCA 1985) 11

Watson vs. Builders Square, Inc., 563 So. 2d 721 (Fla. 4th DCA 1990) 16

Watson v. Owens- Corning Fiberglas Corp., No. 12292-RC (Va. Cir. Ct., City of Newport News 1990), **aff'd**, 243 Va. 128, 413 S.E.2d 630 (1992) 43

Wetzell vs. Bussard, 24 U.S. (11 Wheat.) 309 (1826) 46

Wheeler v. Owens-Corning Fiberglas Corp., Nos. 85-44370, et al. (Tex. Cir. Ct. Harris County 1992) 43

Williams v. A. C. & S., Inc., (Tex. Dist. Ct., Harris County 1993) 43

W.R. Grace & Co. - Conn. vs. Dougherty, 636 So. 2d 746 (Fla. 2d DCA), *review denied*, 645 So. 2d 454 (Fla. 1994) 11, 19, 41

W.R. Grace & Co. -- Conn. v. Waters, 638 So. 2d 502 (Fla. 1994) 41

Wolff vs. McDonnell, 418 U.S. 539 (1974) 40

Yee vs. Cityof Escondido, 112 S. Ct. 1522 (1992) 26

Zabner vs. Howard Johnson's Inc. of Florida, 227 So. 2d 543 (Fla. 4th DCA 1969) 16

Other Authorities

1 W & M, 2d Sess. Ch 2, 3 Stat. at Large 31

§ 782.07, **Fla.Stat.** 36

§ 775.082, **Fla.Stat.** 36

§ 775.083, **Fla.Stat.** 36

§ 774.05, **Fla.Stat.** 36

§ 775.15, **Fla.Stat.** 47

§ 90.403, **Fla.Stat.** 16

§ 90.601, **Fla.Stat.** 15

§ 768.73, **Fla.Stat.** 21, 23, 25, 26

§ 768.81(3), **Fla.Stat.** 10, 12

Article I, § 9 of the Florida Constitution 39

Article I, § 17 of the Florida Constitution 39

Art. I, § 9, Virginia Declaration of Rights	27, 32
Eight Amendment United States Constitution	21, 23, 27
Fourteenth Amendment United States Consitution	21
Art. W. McKechnie, **Magna Carta** 284-285 (2d ed. 1958)	28, 29, 30
B. Schwartz, **The Bill of Rights: A Documentary History** 233 (1971)	32
D. Owen, Punitive Damages in Product Liability Litigation, 74 Mich. L. Rev. 1257 (1976)	35
G. Smith **A Constitutional and Legal History of England** 367 (1955)	31
H. Hazeltine, **Magna Carta Commemoration Essays** 182 (H. Malden ed 1917)	32
J. Jolliffe, **The Constitutional History of Medieval England** 225 (3d ed. 1954)	28
J. Holt, **Magna Carta** 50, 230-231(1965)	29
L. Schwoerer, **The Declaration of Rights**. 1689, 259 (1981)	31
R. Stringham, **Magna Carta: Fountainhead of Freedom** 13 (1955)	29
4 R. Rotuda & J. Nowak, Treatise on Constitutional Law 6661 (1992)	27
S. Berger, **Products Liability and Punitive Damages: An Incompatibility**, 1 Trial Adv. Q. 49, 55-56 (March 1982)	37
W. Blackstone, **Commentaries on the Laws of England** 372 (1768)	31
Magna Carta	passim

Mealey's Litigation Reports (Asbestos) (February 17, 1995; March 1, 1995) 34

INTRODUCTION

This is an appeal from an amended final judgment in an asbestos personal injury action rendered by the Hillsborough County Circuit Court. Compensatory and punitive damages were awarded in the total amount of $12,301,800.00. The appellant, OWENS-CORNING FIBERGLAS, was a defendant below and will be referred to hereinafter as OCF or APPELLANT. The appellees, CLARENCE DUDLEY and GEORGIANNA DUDLEY were plaintiffs below and they will be referred to collectively as DUDLEY, individually by name, or as APPELLEES.

In this brief, the symbol "R" shall stand for the record on appeal and the symbol "T" shall stand for the transcript of testimony. All emphases in quotations is furnished by counsel unelss otherwise indicated.

This brief is submitted on behalf of the APPELLANT and based upon the reasons and authorities hereinafter contained it is respectfully submitted that the amended final judgment should be reversed and the cause remanded with directions to grant a new trial on all issues and/or alternatively enter judgment in favor of OCF on the issue of punitive damages and submit the balance of the cause to retrial.

STATEMENT OF CASE AND FACTS

I. CASE

The action below was commenced on December 13, 1993, by the filing of a complaint against OCF and 10 other defendants that manufactured or distributed asbestos-containing products. (R 1-11). OCF

answered and raised as affirmative defenses, *inter alia*, comparative negligence, state of the art, and the negligence of others diminishing the responsibility of OCF in proportion to the fault attributed to those others. (R 15-23). "Exposure sheets" and amended "exposure sheets" common to asbestos litigation were filed by DUDLEY (R 65-83, 139-143). The exposure sheets identified asbestos-containing products allegedly manufacutred or sold by various manufacturers to which DUDLEY was allegedly exposed between 1971 and 1973. All exposures allegedly occurred at the Tampa shipyard.[1] By the time the cause came on for trial, all other defendants had been dropped, dismissed or otherwise eliminated from the litigation and trial proceeded against OCF only.

Prior to trial, OCF filed a notice aopting a prio motion to strike the claim for punitive damages filed in the master file for asbestos litigation (R 488-490), a motion in limine to exclude the deposition testimony of John H. Thomas, a former president of OCF (R 270-406), and a brief in support of the latter motion. (R 420-432). The motion in limine has been denied in

---

[1] The products included Armabestos pipe covering, Armabestos block, Super 711 cement, Caltemp pipe covering, Caltemp block, Super Caltemp pipe covering, Super Caltemp pipe block, Flexitallic Spiral Wound Gasket, asbestos gaskets, Calsilite cement, Calsilite pipe covering, Calsilite block, Garlock Spiral Wound Gasket, Garlock Sheet Gasket, Goldbond cement, Goldbond asbestos cement siding, Unibestos pipe covering, One Shot cement, Delta Made One Shot Cement, Redtop Cement and Kaylo block and pipe covering manufactured or distributed by OCF.

each Hillsborough County asbestos case,[2] and it was revisited at trial (T 453-458). DUDLEY was permitted to use Thomas' deposition over OCF's objection. Motion for directed verdict on punitive damages was denied at the close of all evidence. (T 1182).

During the course of trial, OCF advised the court of a scheduling problem regarding one of ifs only scheduled witnesses, Jerry Helser, (T 783), stating that Mr. Helser was testigying in a Texas case and could not be in Tampa until Monday of the following week. This situation was raised on Thursday but the case was concluded on Friday. DUDLEY acknowledge that Helser had testified in prior trials and that he traveled from court to court as an OCF employee testifying in asbestos cases. (T 784). OCF asked to utilize Helser's testimony from another Tampa case involving the same plaintiffs' counsel, but the court refused. Basically, the court stated that the alternate had already replaced a juror and that he did not want to carry the case over to the following Monday. (T 788). There was no finding that APPELLEES would be prejudiced by a one day continuance. Notwithstanding OCF's representation that Helser was in Texas, the court simply stated that OCF should get its witness to trial. (T 788). OCF subsequently proffered the testimony of Helser from the earlier trial (T 1177; R 1686-1818).

---

[2] The issue is pending before this court in the case of *Permuy vs. Owens-Corning Fiberglas Corporation*, Case No. 94-00904.

During the jury instruction conference, OCF requested jury instructions on, and inclusion in the verdict of, the fault of other manufacturers and distributors of asbestos-containing products. (T 1188-1195, 1199). The court denied OCF's requests.

After receiving instructions and deliberating approximately two hours, the jury returned a verdict against OCF finding that it had been negligent and that it had placed Kaylo on the market with a design defect. The jury found no comparative negligence as to DUDLEY and awarded total compensatory damages to MR. DUDLEY in the amount of $2,750,000.00, and to MRS. DUDLEY, $1,510,000.00. The jury also awarded punitive damages in the amount of $15,000,000.00 (1307-1308). Post-trial motions were directed to the verdict (R 704-712, 723-726) and the amended final judgment followed. (R 733-734). This timely appeal followed. (R 736-743).

II. FACTS

DUDLEY was a sheet metal worker emloyed at the Tampa Shipyard in June, 1971. (T 223-224). Although he had been in the Navy and the Merchant Marine between 1944 and 1948 (T 221-222), he claimed that his only exposure to asbestos-containing products occurred in or around 1972 when he worked in the engine and boiler rooms of tankers and cargo ships (T 225). DUDLEY did not work with any asbestos-containing products himself, but he claimed to be close to people who were applying insulation, that application of insulation resulted in asbestos-containing dust and that he breathed the dust. (T 225-226). DUDLEY did not know the names of any of the

products or any of the manufactureres of products being used at the shipyard in 1972. (T 228). Although DUDLEY used face masks when he was in the vincinity fo the gringing of fiberglass (T 254-255), he never wore a mask when working in proximity to insulation workers. (T 255).

Thomas Keene was also employed in the Tampa shipyards in 1972 as a boilermarker. (T 560). He installed insulation products and saw other workers applying insulation products in the ships. (T 560). Keene identified Kaylo pipe covering by name as one of the insulating products used in the ships. (T 561, 570). Keene saw DUDLEY in the engine and boiler rooms on many occasions when insulating products were used. (T 567). Keene claimed that he did not observe any warning of any type on boxes of Kaylo in 1972.[3] (T 567). It was Keene's recollection that Kaylor was used as the predominate pipe covering in the shpyard and that perhaps 65% to 70% of the peipe covering was Kaylo. (T 570).

Keene, however, also saw and worked with asbestos-containing cement and cloth, as well as asbestos-containing gaskets. (T 571-572). The cloth, Garlock Sheet Packing and Flexitallic gaskets gave off some dust during installation and the gaskets gave off a considerable amount of dust in removal. (T 572). Pipe covering that was used on the job was made by Keene Corporation, Carrie (sic) and OCF but he could

---

[3] It was uncontroverted that OCF placed warnings on boxes of Kaylor in 1967 (T 1058), years before OSHA required such warnings. (T 1124).

not remember other names. (T 581-582). All pipe covering was white once it was removed from the box regardless of the manufacturer. (T 583-584). Additionally, Johns-Manville blue mud was used, and the blue mud created dust when it was mixed. (T 586-588). Numerous types of asbestos-containing cements were used including Power House and One Coat. Eagle Pitcher was one of the manufacturers, as were Johns-Manville, Unibestos and Carrie (sic) temp. (T 590-591). Keene admitted that the shipyard provided cloth masks to the workers (T 590-591), but he claimed that no safety meetings were ever held and no warnings or instructions were ever given to the workers by the employers. (T 590-595). The workers "very seldom" used masks. (T 593). Keene never saw warning labels on any of the boxes or containers of asbestos-containing materials regardless of the manufacturers. (T 595).

Conflicting evidence was presented regarding the hazard associated with asbestos, the knowledge of the medical community, industry and science at various periods in history, and the efforts of OCF to remove asbstos from Kaylo, its only asbestos-containing product (e.g., T 450, 483-384, 486-491, 515, 522, 524-525, 632-635, 638-641, 644-655, 674-677, 702, 729-732, 733-737, 769, 801-809, 895-902, 915, 1015, 164-174, 1108, 1112-1113, 1114, 1124). Medical evidence was also presented to demonstrate the MR. DUDLEY had developed mesothelioma from his short exposure to asbestos-containing fibers in 1972. (E.g. T 290, 292, 297-298, 301, 304-306, 333, 335, 346-347, 403, 407, 410, 420, 610-611, 612, 622). Solely for purposes of this appeal, and without waiving

any arguments respecting any of the pretrial or intra-trial rulings on evidentiary or other matters, OCF will assume *arguendo* that the evidence was sufficient to support DUDLEY's theory. However, in determining whether the trial court erred in failing to grant a continuance or in failing to allow OCF to use the testimony of Jerry helser from a recently concluded trial involving the smae plaintiffs' attorney, OCF deems it necessary to point out certain portions of Helser' testimony as proffered. Mr. Helser is an employee of OCF attached to its residential and commercial roofing laboratory. He was involved with the production of Kaylor and efforts by OCF to replace asbestos in Kaylo. He is the only remaining OCF employee from the time when OCF was attempting to replace the asbestos fibers. (Exhibit 43, p. 1617).

Helser described the manufacturing process involved with Kaylo (Exhibit 43, pp. 1619-1642). In the late 1960's he was a project manager working on various projects for OCF including the attempt to replace asbestos fibers in Kaylo. (Exhibit 43, p. 1623). He described the uses of Kaylo as a high temperature insulating material (Exhibit 43, page 1626-1627) and compared it with other insulation products that would not withstand high termperatures. Helser stated that OCF started to manufacture asbestos-free Kaylo in November, 1972. (Exhibit 43, page 1628). Significantly, he stated that in the 1960's, all high temperature thermal insulation contained asbestos. (Exhibit 43, p. 1637).

Helser described all of the attempts to create a comparable product without the use of asbestos. (Exhibit 43, pp. 1639, 1642, 1648). He recounted

each of the problems encountered by OCF in its attempts to utilize material other than asbestos. Additionally, Helser testified that the word "caution" first appeared on a warning on a Kaylo box in 1970. (Exhibit 43, p. 1658). Helser was the individual who ordered the first warning stamp used on boxes of Kaylo, and he described the directive he received, the purchase of the stamp, the contents of the warning and the eventual use of boxes with a pre-printed warning. (Exhibit 43, pp. 1664-1671). Obviously, there were many fine points relating to the production and distribution of Kaylo, Mr. Helser's various jobs and duties, and conditions at the plant where Kaylo was manufactured. It is extremely important to bear in mind that Helser would have been the only living corporate employee able to testify about the matters contained in the proffered transcript and that counsel for DUDLEY emphasized the fact that no OCF employee testified at trial.

SUMMARY OF THE ARGUMENT

This personal injury, asbestos exposure case involves an award of compensatory and punitive damages in the total amount of $12,301 ,800.00. MR. DUDLEY was diagnosed with mesothelioma - a form of cancer often associated with inhalation of asbestos fibers and which is usually fatal. He was allegedly exposed to an OCF asbestos-containing product for a short time in 1972.

The trial court committed multiple harmful errors which require that this Court reverse the amended judgment. Initially, the trial court failed to apply §768.81 Fla. Stat., as interpreted in *Fabre*. Sufficient evidence would have allowed a jury to conclude that a

substantial part of DUDLEY's inhalation of asbestos fibers came from products manufactured or distributed by others. Evidence also demonstrated that DUDLEY's employers made no attempt to provide a safe working environment and they, too, should have been allocated a portion of responsibility. Indeed, DUDLEY's exposure to asbestos was of such short duration, at a single location, that it is inconceivable that a jury would not apply the same negligence or strict liability standards to other manufacturers and distributors. This error mandates a new trial.

Furthermore, the trial court allowed DUDLEY to utilize portions of the deposition of a prior president of OCF taken in another action. That deposition was taken at a time when the gentleman was 83 years of age and suffered mental disabilities which rendered his opinions and recollection untrustworthy. A motion in limine was addressed to the deposition and the use of the deposition was objected to during trial. The trial court committed reversible error in denying the motion in limine and in refusing to sustain the objections during trial. Mr. Thomas was incompetent to testify at the time he gave his deposition or, in the alternative, any marginal competency was far outweighed by the unfair and highly prejudicial impact of the confused and incorrect testimony of Mr. Thomas. The error becomes even more important in light of the fact that the trial court also abused its discretion in denying a one day continuance to allow OCF to present a critical witness. The witness was in Texas testifying in another case and could not be in two places at the same time. Alternatively, OCF suggested the use of a transcript of the testimony given by the witness in a

recent Tampa trial in which the witness was cross-examined by the same attorney representmg DUDLEY. DUDLEY's objection to use of the transcript was sustained and OCF was severely curtailed in its ability to defend this significant litigation. In fact, DUDLEY emphasized in closing argument the failure of OCF to bring a corporate witness to trial. Either of these evidentiary ruling require a new trial and together they cry out for the grant of a new trial.

Beyond these issues, this case presents a number of constitutional infirmities in continued awards of punitive damages against OCF for the same course of conduct. OCF moved to strike the claim for punitive damage and moved for a directed verdict at the close of all evidence. OCF also addressed post-trial motions to the constitutionality of further awards of punitive damage against it in asbestos litigation.

OCF has been repeatedly punished and has been subjected to "overkill" in the imposition of punitive damages for the same course of conduct which ended more than 20 years ago. The award of punitive damages in this case violates the Excessive Fines Clause of the Eight Amendment and Due Process Clause. It is also contrary to Florida's own constitutional Declaration of Rights. The time has now come for this Court to say: "enough is enough." Whether this Court grants a new trial on all issues, as OCF believes the Court should do, the Court should reverse the judgment for punitive damages and determine that further awards of punitive damages against OCF for the same course of conduct are no longer constitutionally permissible.

ARGUMENT

POINT I. WHERE THERE IS EVIDENCE THAT NEGLIGENCE OF NON-PARTIES SUBSTANTIALLY CONTRIBUTED TO A PLAINTIFF'S INJURIES, THE TRIAL COURT ERRS IN REFUSING TO ALLOW THE JURY TO CONSIDER THE NEGLIGENCE OF THE NON-PARTIES AND IN FAILING TO INCLUDE THEM ON THE VERDICT FORM.

Section 768.81(3), Fla. Stat. (1989) provides that the jury must apportion liability among all parties potentially responsible for a plaintiff's injury, whether or not they are present at trial. The doctrine of joint and several liability continues to apply to economic damages with respect to any party whose percentage of fault equals or exceeds that of the plaintiff but as to non- economic damages, judgment must be entered only on the basis of a defendant's percentage of fault. This section was interpreted in *Fabre vs. Mafln,* 623 So. 2d 1182 (Fla. 1993) and *Allied Signal, Inc. vs. Fox,* 623 So. 2d 1180 (Fla. 1993), to require a jury to apportion liability among all persons or entities responsible for a particular plaintiff's injuries whether they are parties to the litigation, former parties, non-parties or even parties who may be immune from suit. In the instant case, the jury awarded APPELLEES substantial sums for both economic and non- economic damages. (T 1307-1308). The trial court refused to allow the jury to consider the fault, if any, of the multitude of other manufacturers or distributors of asbestos-containing products to which DUDLEY was exposed. In refusing to grant OCF's requested jury

instructions and verdict forms regarding the other manufacturers and distributors, the trial court committed reversible error.

As the record demonstrates, DUDLEY originally filed suit against 11 defendants that allegedly manufactured or distributed asbestos-containing products. DUDLEY's "exposure witness" testified that DUDLEY was exposed to asbestos from many products other than those manufactured or distributed by OCF. Mr. Keene specifically remembered some products by name, and his recollection was refreshed as to others. Additionally, Keene testified that none of the products contained warnings, and no safety instructions were provided by the employer or representatives of the federal government who appeared at the job site. OCF submits that the jury should have been allowed to consider the fault, if any, of the other manufacturers and distributors in apportioning responsibility. Some fault could also have been attributed to MR. DUDLEY's employers. The trial court's error requires a new trial.

Although it is clear that a defendant must present evidence sufficient to allow a jury to consider the liability of non-parties, i.e., *W.R. Grace & Co. - Conn. vs. Dougherty,* 636 So. 2d 746 (Fla. 2d DCA), *review denied, 645* So. 2d 454 (Fla. 1994), OCF submits that there was sufficient evidence to allow the jury to apportion at least some responsibility to other entities. There was uncontradicted evidence that each exposure to asbestos can be a substantial contributing cause of mesothelioma, and the evidence and testimony

was equally compelling as to the other manufacturers and at least as legally sufficient.[4] All entities were subject to the same state of the art testimony. The same evidence would have allowed the jury to determine that the other manufacturers and distributors or employers were, to some degree, responsible. See *Allied-Signal, Inc. vs. Fox,* 623 So. 2d 1180 (Fla. 1993); *Schindler Corp. vs. Ross,* 625 So. 2d 94 (Fla. 3d DCA 1993); and see, *A.W. Chesterton vs. Fisher,* 19 FLW D2113 (Fla. 3d DCA, October 5, 1994); *Dewitt Excavating, Inc. vs. Walters,* 642 So. 2d 833 (Fla. 5th DCA 1994); *East West Karate Assoc. Inc. vs. Riquelme,* 638 So. 2d 604 (Fla 4th DCA 1994).

A party is entitled to have the jury instructed on any issues supported by any competent evidence or reasonable inferences from the evidence. Failure to give a proper instruction, or to utilize a proper verdict form, will result in reversal if evidence supported the requested instructions or verdict form. E.g., *Robinson vs. Gerard,* 611 So. 2d 605 (Fla. 1st DCA 1993); *Harnly vs. Watson,* 519 So. 2d 18 (Fla. 2d DCA 1988); *Harwell vs. Blake,* 180 So. 2d 173 (Fla. 2d DCA 1965). In the instant case, very substantial evidence and testimony supported OCF's contention that others were partially at fault and responsible for DUDLEY's exposure to asbestos. No warnings were given by other manufacturers or employers. OCF submits that the judgment must be reversed and the cause remanded for a new trial because the trial court

---

[4] See *Ward v. Celotex Corp.*, 479 So. 2d 294 (Fla. 1st DCA 1985).

failed to grant OCF's requested jury instructions and/or failed to include other potentially responsible parties on the verdict form as required by *Fabre* and Section 768.81(3).

POINT II. WHERE A WITNESS IS SHOWN TO BE INCOMPETENT, HIS TESTIMONY SHOULD NOT BE ADMITTED; ALTERNATIVELY, EVEN IF A WITNESS IS MARGINALLY COMPETENT TO TESTIFY, *ARGUENDO*, IF THE PREJUDICIAL EFFECT OF HIS TESTIMONY WILL OUTWEIGH THE PROBATIVE VALUE, IT SHOULD BE EXCLUDED FROM JURY CONSIDERATION.

OCF filed a motion in limine to exclude the deposition testimony of John H. Thomas from jury consideration. The issue was revisited during trial. Ultimately, the trial court allowed select portions of the Thomas deposition to be read to the jury. OCF submits that Thomas was incompetent to testify as a witness or that, alternatively, the probative value of the marginally competent testimony was far outweighed by the prejudicial effect to OCF. Consequently, the judgment must be reversed and the cause remanded for a new trial.

The motion in limine and the brief in support of it, including attachments, demonstrated that John Thomas was the president of OCF from November 1, 1967, to August 19, 1971. On April 3, 1991, he was deposed as a part of discovery for several cases pending in the United States District Court for the Eastern District of Virginia. Thomas did not waive the reading and

signing of his deposition, and when it was presented to him he made the following disclaimer under oath.

> After reviewing the foregoing transcript I cannot sign it. I did have periods of confusion regarding the questions stated here. Based upon my physician's recommendation, I cannot attest to the complete accuracy of my responses.

Mr. Thomas was 83 years of age at the time of his deposition and, unfortunately, he died five months after giving his deposition. At the time of the deposition, he suffered from multiple medical problems for which he had been treated by his personal physician since November, 1988. That physician, Dr. Gary Parsons, executed an affidavit attached to the brief in support of the motion in limine as Exhibit B. In that affidavit, Dr. Parsons stated that he performed neurological examinations on Mr. Thomas on both November 6, 1990 (prior to the deposition) and April 29, 1991 (after the deposition). Based on the medical findings from those examinations, Dr. Parsons was satisfied, within a reasonable degree of medical certainty, that Thomas' memory was impaired from at least November 6, 1990. According to Dr. Parsons, such memory impairment rendered the testimony given by Thomas untrustworthy. After the deposition, Dr. David Perlmutter conducted a neurological examination and, based upon that examination and his review of all medical records, tests and laboratory studies, it was his opinion that Thomas suffered from a fairly advanced dementia (moderate) based on multiple strokes, advanced cerebral atrophy and possible

contribution by long exposure to alcohol complicated by advanced age.

The deposition transcript demonstrates Mr. Thomas' numerous memory lapses and mental confusion. He was unable to give correct testimony concerning such basic historical information as his date of birth or age. He testified that he was born in 1909 and that he was 43 years of age. Actually, he was born in 1907 and was 83 years of age at the time of his deposition. He also testified that he had been "in the last business" for 43 years when, in reality, he worked in the "last business" for 33 years. Thomas also gave incorrect and inconsistent testimony regarding the offices which he held with OCF and the times that he served in various capacities. He asserted that he became president and then chief executive officee in the mid-1960's. Later he said that he was made president in 1963 or 64 and served as president from 1965 to 1970. He claims to have become chief operating officer in 1970. In reality, he was president from 1967 until 1971, and he was never chief executive officer of OCF. Thomas also testified that at the time of his deposition, he owned 40,000 to 50,000 shares of OCF stock when in reality he owned no shares at all in his own name and only 1,516 shares as settlor of an inter-vivos trust.

The confusion continued when questions were directed at specific knowledge of asbestos and alleged hazards from breathing asbestos fibers. For example, in the midst of questioning about labels on Kaylo products, Thomas testified:

> Never knew that they were planning on a label or that they were putting one out. Didn't know anything about labelling anyway except I have one hell of a time reading the cautions because they got the print so goddamn fine that you can't read them.

When OCF's counsel asked Thomas what he was talking about, Thomas, responded "my medicine mostly." In response to a question about attempts by OCF during the 1940's to combine asbestos and fiberglass, Thomas rambled into a dissertation about mittens to pick up hot plates "and the whole big thing I remember when I was a kid, Nickelodeon in our town, when the show was over the curtain came down and said asbestos. And that's supposed to save us." He later volunteered "that's when Nickelodeon costs a nickel."

On the critical question of OCF's knowledge of the hazard of asbestos, Thomas' testimony contradicted itself so frequently and diametrically that it compels the conclusion that Thomas could not correctly recall past events. For example, Thomas testified that he had no independent recollection of discussions concerning the hazards of asbestos in the 1940's and 1950's and that he did not recall any animal studies showing that Kaylo dust could cause lung disease in laboratory animals. He also testified that he did know in the 1940's that asbestos dust could cause sickness in insulators. Still later he testified that he was not involved with OCF's products prior to 1964 and that he had no occasion to know about animal studies purportedly demonstrating hazards associated with asbestos before that time.

These are but a few examples of the obvious confusion demonstrating the mental impairment and untrustworthiness of Mr. Thomas' deposition.

Under the Florida Evidence Code, every person is presumed to be competent to testify. Section 90.601, Fla. Stat. (1985). The question of competency is to be determined by the trial court under Florida law. E.g., *Cllnton vs. State,* 53 Fla. 98, 43 So. 312 (1907). Most Florida decisions dealing with the issue of competency have dealt with the proposed testimony of infants and children. Of the few cases touching on the question of the competency of an adult, most merely state that credibility is an issue to be argued to the jury. In so doing, the reported appellate decisions generally give great deference to the trial court's ability to see the witness, view the witness's demeanor, facial expressions and body language, and otherwise observe first hand whether the witness appears to be competent. Respectfully, those cases have no bearing on the question of whether the deposition of a now-deceased witness may or may not be read to a jury.[5] The trial court had no more opportunity to observe Thomas than does this Court. Thus, OCF submits that the ordinary presumptions favoring the exercise of a trial court's discretion do not apply here because that this Court is

---

[5] There appears to be only one reported decision dealing with this deposition despite the fact that its use is an issue in almost every OCF asbestos trial. That decision is *In re Asbestos Litigation*, 1992 Del. Super. LEXIS 488 (October 26, 1992). In the decision, the trial court adopts virutally every argument made by OCF in this case.

in the same position as the trial court in determining the question of competency.

Even if this Court were to determine that Thomas was marginally competent to testify, and that the inconsistencies and misstatements in his deposition were merely items to be argued regarding credibility, §90.403 of the Florida Evidence Code provides that when the probative value of evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury or needless presentation of cumulative evidence, it is inadmissible. OCF submits that confused, incompetent, unresponsive and demonstrably erroneous testimony of a former corporate president has such a tendency to create unfair prejudice that any limited probative value is far overshadowed by the prejudicial effect. This is not unlike the case of *Simmons vs. Baptist Hospital of Miami, Inc.*, 454 So. 2d 681 (Fla. 3d DCA 1984), where the court found that the limited probative value of the evidence at issue in that case "even if marginally relevant, was entirely outweighed by its unfairly prejudicial character . . ." 454 So. 2d at 682. See also, *Watson vs. Builders Square, Inc.*, 563 So. 2d 721, 723 (Fla. 4th DCA 1990); *La Reina Pharmacy, Inc. vs. Lopez*, 453 So. 2d 882 (Fla. 3d DCA 1984); *Zabner vs. Howard Johnson's Inc. of Florida*, 227 So. 2d 543 (Fla. 4th DCA 1969); and see, *Perper vs. Edell*, 44 So. 2d 78 (Fla 1950).[6]

---

[6] See *In re Asbestos Litigation, supra*, which notes that some trial courts have admitted this deposition while others have exlcuded it. The court there seemed to say that other courts which had admitted the deposition had not read

The issue of liability was hotly contested. To the extent that the deposition of OCF's former president presented a confused and misleading picture to the jury, it had to result in prejudice to OCF far outweighing any probative value. In fact, the jury took just about two hours to award a total of $19,260,000.00. This may well have been based upon a determination that the Thomas deposition established OCF's knowledge of some type of hazard long before reasonable knowledge was actually changeable to OCF. This is even more likely when this court considers the inability of OCF to present a critical live witness. See Point III, infra. The failure to exclude the deposition of Mr. Thomas is sufficient to require a new trial, particularly because DUDLEY highlighted the Thomas testimony in closing argument (e.g., T 1216, 1220).

POINT III. THE COURT ERRED IN REFUSING TO CONTINUE TH ETRIAL FOR ONE DAY TO ALLOW OCF TO PRESENT CRITICAL TESTIMONY OR, ALTERNATIVELY, IN REFUSING TO ALLOW OCF TO USE A TRANSCRIPT OF THE WITNESS'S TESTIMONY FROM A PRIOR TRIAL.

During trial, OCF told the court that its corporate witness, Jerry Helser, was in trial in Texas and could

---

the full transcript or medical affidavits in order to balance the probative value against the unfair prejudice and confusion.

not be present until Monday, thereby necessitating a continuance over the weekend. The court refused, stating that one of the jurors had become ill, and with no alternate left, the case would have to conclude on Friday. OCF alternatively requested permission to utilize a transcript of Mr. Helser's testimony from a prior trial involving the same plaintiffs' counsel THAT had only recently been given in Tampa. DUDLEY successfully objected to use of the transcript. Consequently, OCF was forced to conclude its defense without a critical witness. In the context of mass tort litigation, where corporate employee witnesses may be called upon to testify repeatedly in diverse jurisdictions, it is manifestly unfair to refuse a simple request to adjourn for the weekend to allow presentation of live testimony or, alternatively, to refuse to allow testimony from a prior trial involving the same plaintiffs' lawyer and the same issues to be read in lieu of live testimony.

In the instant case, DUDLEY acknowledged that he had previously cross-examined Helser (T 784) but failed to accept an accommodation that would allow OCF to defend itself. Having successfully prevented OCF from presenting this witness, DUDLEY's counsel then proceeded to argue to the jury that while he had presented the testimony of OCF's former president [see Point II, supra], and that OCF spends millions of dollars on defense of these cases, OCF nonetheless brought no doctor in to testify and that nobody from OCF had testified -- the only defense testimony being that of two "hired witnesses." (T 1216-1218, 1282). The jury was obviously coaxed to believe that only DUDLEY was in a position, or cared enough, to bring

live witnesses to trial and that OCF was willing to spend millions of dollars to defend cases but was not willing to send a corporate employee to trial. DUDLEY set the stage and cast OCF's counsel in an impossible role. The result was a "bad review" from the jury!

The granting or denying of a motion for continuance is within the sound discretion of the trial judge. Ordinarily, absent an abuse of discretion, an appellate court will not substitute its judgment for that of the tiral judge. E.g., *Edwards vs. Pratt*, 335 So. 2d 597 Fla. 3d DCA 1976). Nonetheless, egregious situations have led to reversal. In the criminal context, *Robinson vs. State*, 561 So. 2d 419 (Fla. 1st DCA 1990) is a prime example. After a jury had been selected, defense counsel "brought to the court's attention" the absence of a witness who had been subpoenaed. Id. at 420. A few days later, defendant moved for a continuance and alleged that the witness had still not been located. The trial court denied a continuance but gave the defense 24 hours to secure the witness's presence. When the parties appeared before the court 24 hours later, defendant renewed his motion for continuance, the court denied the motion and defendant was convicted. The First District reversed, finding it a palpable abuse of discretion to force a defendant to trial without the testimony of a critical witness.

In *Outdoor Resorts at Orlando, Inc. vs. Hott Management Co., Inc.*, 483 So. 2d 2 (Fla. 2d DCA 1985), this Court granted a writ of certiorari and quashed an order denying a motion for continuance. The motion in that case alleged that a corporate witness would be unavailable due to illness. This Court

recognized that the granting or denying of a motion for continuance is customarily within the discretion of the trial court but that where there is a "risk of an injustice" by requiring a party to proceed to trial without a material witness, such risk of injustice would outweigh this Court's policy of not interfering with the exercise of this type of discretion. Because the trial in that case was being conducted without a jury, this Court noted that the parties could avoid the problem by allowing the case to proceed by offering the absent witness' testimony by way of deposition at a later time. See also *Thompson vs. General Motors Corp.*, 439 So. 2d 1012 (Fla. 2d DCA 1983).

OCF submits that the trial court abused its discretion when it refused to recess on Friday afternoon to allow OCF to present Mr. Helser as a live witness on Monday morning. The transcript reflects that the jury retired to deliberate at 6:10pm on Friday and returned with its verdict at 8:15pm. It would have been a simple matter to allow the case to conclude on Monday morning. It was not necessary for the court to grant a lengthy delay; all that was necessary was a weekend's break. This Court should engage in the "balancing of interests" articulated in *Outdoor Resorts at Orlando,* 483 So. 2d at 3, and reverse the judgment. DUDLEY opportunistically emphasized to the jury in closing argument that OCF had failed to bring any corporate employees to court to testify. There is a strong likelihood that a verdict of this magnitude resulted from the jury's belief that OCF exhibited a cavalier

approach to this litigation by failing to send a single live corporate wimess to testify.[7]

POINT IV. THE PUNITIVE DAMAGE AWARD IMPOSED AGAINST OCF VIOLATES THE EXCESSIVE FINES CLAUSE OF THE UNITED STATES CONSTITUTION AS A MATTER OF LAW.

A. The Excessive Fines Clause of the Eighth Amendment Imposes Limitations on Punitive Damage Awards When the State Has a Right to Recover a Share of the Damages Awarded.

The Excessive Fires Clause of Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The State of Florida receives a share of a punitive damage award by operation of Section 768.73, Fla. Stat., and this subjects the award

---

[7] Space limitations prevent full briefing of the recurring question of the use of testimony or depositions in prior cases involving the same or similar issues, the same plaintiffs' attorneys, but different named plaintiffs. OCF adopts by reference its motion to admit prior testimony (R 484-485) and brief in support thereof (R 238-269). On occasion, it is impossible to fully brief and argue each point which an appellant may deem to be significant because of the 50 page limitation on initial briefs and the reluctance of appellate courts to allow the filing of substantially enlarged briefs. OCF submits that the arguments in the brief filed in the trial court more than amply demonstrate the reasons why, as a minimum alternative, the trial court should have allowed OCF to utilize Mr. Helser's testimony from the prior trial.

to the Eighth Amendment. As will be shown below, the textual antecedents of the Excessive Fines Clause of the Eighth Amendment establish that the Clause was intended and designed to prohibit the arbitrary imposition of excessive monetary punishments, including punishments imposed in the form of punitive damages.[8]

Although the Cruel and Unusual Punishments Clause has been the subject of extensive constitutional litigation, the Supreme Court has had occasion to consider the specific application of the Excessive Fines Clause only three times since the Eighth Amendment's ratification in 1791, all in the past five years. See *Browning-Ferris Indus. of Vt., Inc vs. Kelco Disposal, Inc.*, 492 U.S. 257, 262 (1989) ("[T]his Court has never considered an application of the Excessive Fines Clause); *Austin vs. United States,* 113 S. Ct 2801 (1993); *Alexander vs. United States,* 113 S. Ct. 2766 (1993). In *Aetna Life Insurance Co. vs. Lavoie,* the Supreme Court recognized that a challenge to punitive damages as excessive under the Eighth Amendment "raise[d] important issues which, in an appropriate

---

[8] The Excessive Fines Clause of the Eighth Amendment applies to the States through the Due Process Clause of the Fourteenth Amendment. The Supreme Court has held specifically that the Cruel and Unusual Punishments Clause of the Eighth Amendment applies to the States, and has assumed the same result for the Bail Clause. See *Schilb vs. Kuebel,* 404 U.S. 357, 365 (1971) (Bail Clause); *Robinson v. California,* 370 U.S. 660, 667 (1962) (Cruel and Unusual Punishments Clause). Nothing in case law or logic could suggest that the prohibition against excessive fines would not also be applied to the States.

setting, must be resolved." 475 U.S. 813, 828-829 (1986).

The Supreme Court recently rejected the proposition that the Excessive Fines Clause applies only to criminal proceedings. See *Austin*, 113 S. Ct. at 2804. *Austin* raised the issue whether the Government's ability to exact criminal punishment using the mechanism of *in rem* civil forfeiture proceedings implicated the Excessive Fines Clause of the Eighth Amendment. The Court ruled that the excessive Fines Clause does contemplate limits on such monetary punishments and reasoned that the applicability of the Eighth Amendment does not turn on whether a particular proceeding is civil or criminal, but on whether the sanction imposed can be classified as "punishment." 113 S. Ct at 2805-2806. Observing that the common "'notion of punishment ... cuts across the division between civil and criminal law,'" the Court concluded that the "'Excessive Fines Clause limits the Government's power to extract payments" whenever imposed as "'punishment for some offense.'" Id. at 2805 (quoting *United States vs. Halper*, 490 U.S. 435, 447-448 (1989), and *Browning-Ferris*, 492 U.S. at 266-267). *Austin* stands for the proposition that any monetary punishment imposed by or payable to the Government is subject to the limitations of the Excessive Fines Clause.

The Supreme Court's interpretation and application of the Excessive Fines Clause in *Austin* follows the course charted by that Court four years earlier in *Browning-Ferris*. In *Browning-Ferris*, the Court suggested that the Excessive Fines Clause places constitutional limitations on monetary punishments

imposed in the form of civil punitive damages if the government is entitled to a share of the award. *Browning-Ferris* 492 U.S. at 268. The *Browning-Ferris* Court determined that the Excessive Fines Clause does not "constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded· Id. at 264. However, the Court specifically reserved judgment on the issue whether the Excessive Fines Clause was intended to limit monetary punishments either "directly imposed by" or "payable to" the government. Id. at 268. This case raises the specific issue reserved in *Browning-Ferris:* whether the Excessive Fines Clause constrains the imposition of punitive damage awards in civil cases where the State takes a share of any exemplary damages awarded.

1. Punitive Damages Assessed in Florida Courts Pursuant to Florida Statute Section 768.73 Are Monetary Punishments Subject to Constitutional Limitation by the Excessive Fines Clause of the Eighth Amendment.

Commonalties between punitive damages and traditional criminal punishments include: the punitive purposes served by exemplary damages combined with the use of the State's machinery for procuring them. As their name suggests, and as historically understood, punitive damages serve the same punitive goals as criminal punishments. The Supreme Court has recognized that "punitive damages are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible

conduct and to deter its future occurrence." *International Bhd. of Elec. Workers vs. Foust,* 442 U.S. 42, 48 (1979) [quoting *Gertz vs. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)].[9]

Under Florida law, "the availability of punitive damages is reserved to those kinds of cases where private injuries partake of public wrongs. . . [where the acts sanctioned] authorize punishment which may deter future harm to the public by the particular party involved and by others acting similarly." *Ingram vs. Peitit,* 340 So. 2d 922, 923-24 (Fla. 1976). Indeed, under Florida law a "defendant does have a right to be free from unreasonable **punishment** inflicted by an excessive **punitive damages** award." *St. Regis Paper Co. vs. Watson,* 428 So. 2d 243, 248 (Fla. 1983).

Given the purpose of punitive damages, it is entirely appropriate to classify them as monetary punishments triggering a need for constitutional review under the Excessive Fines Clause. In the wake of *Browning-Ferris* and *Austin,* it is evident that the sphere of such monetary punishments encompasses more than the modern notion of punitive fines or even forfeitures, but

---

[9] See also, *Memphis Community School Dist. vs. Stachura,* 477 U.S. 299, 306 n.9 (1986) ("purpose of punitive damages is to punish the defendant for his willful or malicious conduct and to deter others from similar behavior"); *Smith vs. Wade,* 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) ("punitive damages are quasi-criminal and punitive fine[s] that provide "a windfall to plaintiffs") (internal quotations omitted); *Rosenbloom vs. Metromedia, Inc.,* 403 U.S. 29, 82 (1971) (Marshall, J., dissenting) (punitive damages "serve the same function as crrminal penalties and are in effect private fines").

instead includes mandatory monetary payments payable to a sovereign, that punitive damages "can only be explained as serving in part to punish." *Austin,* 113 S. Ct. at 2805-2806. See *Browning-Ferris,* 492 U.S. at 265. The Court recognized in *Browning-Ferris* that a distinction of constitutional dimension exists between punitive damages imposed in suits between private parties where the plaintiff is entitled to the entire punitive damage award, and punitive damages awards where the State collects a portion of the award.[10]

Under §768. 73(2)(b) Fla. Stat., the State of Florida is entitled to 35% of any punitive damages awarded. The Florida Legislature has thus taken affirmative steps to ensure that punitive damage awards paid by civil defendants are diverted to public purposes in addition to providing a reduced windfall to the plaintiff. In upholding the constitutionality of §768.73(2), the Supreme Court has correctly noted that "[u]nlike that right to compensatory damages, the allowance of punitive damages is based entirely upon considerations of public policy," subjecting the very

---

[10] In her partial dissent in *Browning-Ferris,* Justice O'Connor noted that the *Browning-Ferris* majority's reliance on the "distinction between governmental involvement and purely private suits" suggested that the Excessive Fines Clause will place some limits on the awards of punitive damages that are recovered by a governmental entity." *Browning-Ferris,* 492 U.S. at 298-99 (O'Connor, J., dissenting). Justice O'Connor characterized the majority's conclusion that the Excessive Fines Clause imposes no restrictions on the amount of punitive damages that can be awarded in suits between private parties "neither compelled by history nor supported by precedent." Id. at 283 (O'Connor, J., dissenting).

existence of a claim for punitive damages to the prerogative of the State Legislature. *Gordon vs. State,* 608 So. 2d 800, 801 (Fla. 1992), *cert. denied,* 113 S.Ct. 1647 (1993). The Court concluded that §768.73(2) bears a rational relationship to legitimate legislative objectives, among them "to alot the public weal a portion of damages designed to deter future harm to the public." Id. at 802. Of course, the Florida Supreme Court's description of the objective of §768.73(2) is entirely consistent with the notion of punitive damages as monetary punishments. As the Third District wrote in *Gordon,* "it is clear that the present statute is founded upon and directly serves one of the most basic justifications for punitive damages in the first place: to serve as punishment for what amounts to a public wrong, and thus to protect the public by inhibiting future such conduct." *Gordon vs. State,* 585 So. 2d 1033, 1036 (Fla. 3d DCA 1991) (footnote omitted), *affirmed,* 608 So. 2d 800 (Fla. 1992), *cert. denied,* 113 S. Ct. 1647 (1993).

The structure of §768.73 reflects the Florida Legislature's judgment that the State's interest in a punitive damage award stands on equal footing with that of the injured plaintiff. First, the statute allocates the proceeds of a punitive damage award roughly equally between the State and the injured party, with the State receiving 35 % of the award and the injured party receiving approximately 44% of the award (after reduction for standard attorneys' fees). See, Sections 768.73(2)(b) and (7), Fla Stat. Second, if any part of an award of punitive damages is uncollectible, the injured party and the State are each entitled to a proportional share of the punitive damages actually

collected. §768.73(6), Fla. Stat.[11] The State's share of the punitive damages awarded in this case is $2,887,500.00. Indeed, in cases currently on appeal throughout Florida, millions of dollars in punitive damages against OCF are at issue and the State stands to gain substantial revenue by virtue of the operation of Section 768.73(6).[12]

B. The History of the Excessive Fines Clause Informs the Standard for Evaluating the Constitutionality of Excessive Monetary Punishments.

Because the Excessive Fines Clause places constitutional limitations on the size of punitive damage awards in this case, this Court must determine whether these punishments are "excessive" under the Excessive Fines Clause. In its consideration of the application of the Excessive Fines Clause in three cases over the last five years, the Supreme Court has declined to establish any particular test for excessiveness, deeming it prudent to "allow the lower courts to consider that question in the first instance." *Austin,* 113 S. Ct. at 2812 [citing *Yee vs. City of Escondido,* 112 S. Ct. 1522 (1992)]; see also

---

[11] Similarly, if a case settles after a verdict awarding punitive damages has been returned, § 768.73(4) entitles the State to a 35% share of the portion of the settlement amount that the punitive damage proportion of the verdict bore to the total of all damages in the verdict.

[12] For example, in the First District alone at least five appeals are pending in cases where juries awarded approximately $10,000,000.00 in punitive damages against OCF.

Alexander, 113 S. Ct. at 2776. Faced with the Supreme Court's invitation to define the meaning of "excessiveness" under the Eighth Amendment, this Court should look to the history of the Excessive Fines Clause, and particularly, to the abuses that particular provision was intended to guard against, to determine standards for its application to punitive damage awards. See generally, 4 R. Rotuda & J. Nowak, Treatise on Constitutional Law 6661 (1992) (clauses of the Constitution should be construed in light of the mischief leading to their adoption) (citing *Jarrolt vs. Moberly,* 103 U.S. (13 Otto) 580 (1881)); *Prigg vs. Pennsylvania,* 41 U.S. (16 Pet.) 539 (1842).

An examination of the historical textual antecedents of the Excessive Fines Clause demonstrates that the Clause was intended to curb unrestrained monetary punishments. The Eighth Amendment's prohibition against excessive fines was based on English common and statutory law. Nowhere in American or English common or statutory law is there a basis for repeated monetary punishment for one course of conduct. Text of the Eighth Amendment was "based directly on Art. I, Section 9, of the Virginia Declaration of Rights." *Browning-Ferris,* 492 U.S. at 266 [quoting *Solem vs. Helm,* 463 U.S. 27, 285-286 & n.10 (1983)]. "Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same level of protection - including the right to be free from excessive punishments." *Solem vs. Helm,* 463 U.S. at 286.

The notion that the Bill of Rights in general, and the Excessive Fines Clause in particular, were designed to ensure that Americans enjoyed all rights and immunities of their English brothers, renders the English history underlying its adoption valuable, in understanding the protections bestowed by the Excessive Fines Clause. The history of the Excessive Fines Clause may be traced directly back to 1215 and the provisions of the Magna Carta under which substantive limits were placed on the amount of a fine that could be imposed for public wrong. Those substantive limits centered on a proportionality requirement, but also included an underlying guiding principle that the amount of the fme imposed not jeopardize a defendant's livelihood or the defendant's ability to carry on its business.

The historical practice of imposing excessive punishments, which in part motivated the adoption of the English Bill of Rights of 1689 and Magna Carta, dates back many centuries. Prior to the Norman Conquest in 1066, a practice existed in England under which the victim of a wrong, rather than seeking vengeance through retaliation, could instead secure financial compensation from the perpetrator of the offense. This system became mandatory, limiting the right to seek personal revenge to situations in which the injured person had sought and been refused compensation from the wrongdoer. See W. McKechnie, Magna Carta 284-285 (2d ed. 1958). Compensatory sums were imposed as compensation due the victim. At the same time, however, a further payment would be exacted from the wrongdoer as a sum "due to the community", on the ground that every

evil deed inflicts a wrong on society in general, as well as upon its victim. Id. at 285. This theory remains, many centuries later, as the bedrock of punitive damages theory.

This system of settling grievances under Anglo-Saxon law was, at some point after the Norman Conquest, succeeded "by a system, or lack of a system, by which the convicted party was in the King's mercy." J. Jolliffe, The Constitutional History of Medieval England 225 (3d ed. 1954). Under the historical system, the wrongdoer's life, limbs and possessions were put at the King's mercy. The peace was restored by payment of a sum to compensate the victim for his losses (contemporary actual damages) and payment to the Crown as a sum know as an amercement (today's punitive damages). See W. McKechnie, supra, at 286. Payment to the Crown was based on the theory that "offenses against the established order were offenses also against the King." Id. Because a wrongdoer was "at the mercy" of the King who wielded absolute power, in theory there was no limitation on the amount that a wrongdoer could be amerced. In response to the unrestrained imposition of amercements, rules emerged under which the amounts initially amerced were regulated by the gravity of the particular offense involved and were reduced based on the ability of the wrongdoer to pay. The purpose of these rules was to prevent arbitrary and excessively large amercements.

Consistent with the theory that amercements were designed to remedy the wrong done to the public rather than to compensate the person injured, amercements would generally be assessed in a two-stage process. In

the first stage, the maximum possible amercement would be determined by the justices of the court, who had the "duty to see that the amount was proportionate to the gravity of the offense." W. McKechnie, supra, at 288. In some instances, caps on amercements were established by the equivalent of statutes. See J. Holt, Magna Carta 50, 230-231(1965). The second stage of the process of determining the actual amount of the amercement to be imposed in a particular case involved 12 or fewer neighbors who taxed the amercements, "reducing them in accordance with their knowledge of the wrongdoer's ability to pay." W. McKechhie, supra at 288. Thus, while wealth was one of the accepted bases for fixing a fine, see R. Stringham, Magna Carta: Fountainhead of Freedom 13 (1955), it is more accurate to say that lack of wealth functioned in the second stage of the amercements process to allow for the reduction of the maximum potential amercement that had previously been established by courts or statutes.

During the reign of King John, the imposition of amercements became increasingly frequent and unrestrained. Excessive amercements were one of the major concerns leading to the presentation of Magna Carta at Runnymede on June 15, 1215. Three chapters of Magna Carta as accepted by King John on that date were devoted to the problem of excessive amercements. Chapter 20 of Magna Carta provided as follows:

> A freeman shall not amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the

> offense, yet saving always his "contenement"; and a merchant in the same way, saving his "wainage" - if they have fallen into our mercy: and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighbourhood.

Chapter 21 applied these same general principles to earls and barons, while Chapter 22 applied these principles to clergy. The central purpose of these clauses was to remove the arbitrary element in the exaction of amercements.

The method by which amercements were, both before and after Magna Carta, actually imposed illustrates the procedural and substantive content of Chapter 20. The limits of exposure to amercements for any specific wrong were based upon the relative severity of the offense involved, not upon the amount of compensation that might have been due the injured litigant. Chapter 20 also provided that the size of the amercement ultimately imposed might, or perhaps should, be reduced below the maximum potential amercement based upon the wrongdoer's ability or inability to pay. Chapter 20 provided that no amercement could be imposed if to do so would, as in the case of a merchant, result in not "saving his 'merchandise.'" This meant that, in addition to its other safeguards, Chapter 20 "saves to [a merchant] his means of earning a living." W. McKechnie, supra, at 289. Moreover, an amercement, could ultimately bepardoned entirely by the court based on the ability of the amerced to pay.

Over time, the word "fine" took on its more modern meaning and the word "amercement" was no longer generally used. Id. at 293; see also *Browning-Ferris,* 492 U.S. at 289-291 (noting the similar functions of fmes and amercements and the gradual disappearance of nomenclature referring to the latter) (O'Connor, J., dissenting). The use of the word fine carried through and into the English Bill of Rights of 1689, which provided that "excessive Baile (sic) ought not to be required nor excessive Fmes imposed nor cruel and unusual Punishments inflicted." 1 W & M, 2d Sess. Ch 2, 3 Stat. at Large 440, 441(1689). That document was essentially an enactment of the Declaration of Rights of 1689, prepared by a parliamentary convention. Upon accepting the Declaration of Rights, William and Mary had been permitted jointly to ascend to the throne in February, 1689. See L. Schwoerer, The Declaration of Rights, 1689 259 (1981). That instrument, which was "in the tradition of Magna Carta," see G. Smith, A Constitutional and Legal History of England 367 (1955), listed the arbitrary acts of the Stuart Kings that had finally brought on the Glorious Revolution of 1688. These acts included the imposition of "unduly heavy fines." Id. at 368.

The principles of Chapter 20 of Magna Carta were engrafted into Article 10 of the Declaration of Rights of 1689 by a committee of the Parliamentary Convention. The historical material associated with that drafting process establishes that Article 10's express prohibition on excessive fines was intended to apply to fines and amercements, whether imposed in civil or criminal proceedings. L. Schwoerer, supra, 93-94; see also 4 W. Blackstone, Commentaries on the

Laws of England 372 (1768) ("The reasonableness of fines in criminal case has also been usually regulated by the determination of Magna Carta, concerning amercements for misbehavior in matters of civil right.") (footnote omitted).

"It was to the English Bill of Rights of 1689, and Magna Carta [that] the colonists turned as the documentary evidence of the fundamental rights and liberties of all Englishmen. These rights and liberties embodied in Magna Carta, the Bill of Rights and other constitutional documents became vital features of colonial constitutional law." H. Hazeltine, "The Influence of Magna Carta on American Constitutional Development," Magna Carta Commemoration Essays 182, 183-184 (H. Malden ed. 1917). The language of the English Bill of Rights of 1689 respecting excessive fines was incorporated in a number of revolutionary declarations. The Virginia Declaration of Rights of 1776, "repeated from prior documents the right against excessive bail and fines . . . (this time using the very language of the English Bill of Rights that was to become the Eighth Amendment)." 1 B. Schwartz, The Bill of Rights: A Documentary History 233 (1971). Essentially the same language from the English Bill of Rights of 1689 was similarly adopted in other colonies. Ultimately, the Excessive Fines Clause of the Eighth Amendment was lifted verbatim from the Virginia Declaration of Rights of 1776 and the English Bill of Rights of 1689.

1. The Monetary Punishments Imposed Against OCF in the Form of Punitive Damages Violate the Excessive Fines Clause Because These Punishments are Disproportionate to Any Wrong Committed by OCF.

The central premise underlying our Excessive Fines Clause was that a defendant could only be fined in accordance with the gravity of the offense. The available historical evidence demonstrates that this requirement of proportionality was designed to interject a limiting substantive restraint on what had come to be under King Johh the unrestrained imposition of monetary punishments. As held in *Solem vs. Helm,* "[w]hen the Framers of the Eighth Amendment adopted the language of the English Bill of Rights," which was a descendent of Magna Carta, "they also adopted the English principle of proportionality." 463 U.S. at 285-286.

A proportionality standard of review is constitutionally required under the Eight Amendment. In determining whether a punitive damage award is proportional, the following objective factors should be considered: the gravity of the offense, a comparison of profits gained from the wrongdoing with the punishment imposed, and a comparison of amount of punitive damages levied with the legislatively prescribed criminal penalties for similar conduct.

a. Further Punitive Damage Awards Agalnst OCF Would be Wholly Disproportionate to the Gravity of OCF's Alleged Wrongdoing.

The punitive damages awarded against OCF bear no rational relation to the gravity of any asbestos-related transgressions allegedly committed by OCF. The gravity of OCF's actions can only be measured in light of what was known regarding the potentially harmful effects of asbestos during the 1950's and 1960's, not in terms of current awareness. The evidence shows that this is not a situation in which OCF can be said to have decided to enrich its coffers by providing and selling a product that it knew would cause great personal injury.

OCF first distributed asbestos-containing Kaylo in 1953, and began to manufacture Kaylo 1958, when it purchased the Kaylo division from Owens-Illinois. OCF voluntarily placed warning labels on Kaylo packages in 1966. (T 1058). The uncertain state of knowledge during this time period concerning the health hazards posed by asbestos is exemplified by the conflicting testimony of the various experts called at trial. OCF stopped manufacturing Kaylo altogether in 1972 when it replaced the product's asbestos component with other materials.

OCF does not now contend before this Court that its commercial involvement with asbestos is factually insufficient as an evidentiary matter to support an award of punitive damages under common law rules traditionally applied in Florida courts. OCF submits, however, that the evidence regarding OCF's wrongful intent, even when viewed in a light most favorable to

APPELLEES, does not rise to a level that might justify, in light of the Excessive Fines Clause, the continued imposition of massive punitive damage awards against OCF. As of June, 1993, judgments have been entered awarding over $57 million dollars in punitive damages against OCF. That figure continues to grow.[13] This amount is grossly disproportionate to the gravity of OCF's transgressions, and grows ever more so with each punitive damage award that is upheld by an appellate court. This Court should overturn the additional punitive damages awarded below as incompatible with the proportionality requirement of the Excessive Fines Clause.

b. The Punishment Imposed Against OCF in the Form of Punitive Damages is Wholly Disproportionate to any Profits Gained by OCF Through its Alleged Course of Wrongful Activity.

The punishment imposed against OCF in the form of punltive damages is also grossly disproportionate to any profit reaped by OCF for its commercial involvement with Kaylo. OCF's total gross Kaylo profit between 1953 and 1972 amounted to approximately $1.48 million. (T 971). Total net sales were only $127 million for those two decades (T 972). A recent review of Kaylo profitability indicates that

---

[13] In the two most recent issues of Mealev's Litigation Reports (Asbestos) (February 17, 1995; March 1, 1995), punitive damage awards against OCF were reported around the country during that period in the amount of $14,600,000.00.

profits on Kaylo were significantly lower than those on OCF products generally, and that Kaylo profits were between 1 to 2% of sales, or less than $1.5 million, for the entire two decade period. (T 970-971).

The punitive damages already awarded against OCF exceed the total profits OCF received from its dealings with Kaylo by over $50 million. While it could be argued that punitive damages would have no punitive or deterrent utility unless the damages imposed exceeded the profitability of the marketing misconduct by an appropriate modifier, see D. Owen, Punitive Damages in Product Liability Litigation, 74 Mich. L. Rev. 1257, 1319 (1976), here the punitive damages already imposed against OCF for its production and sale of Kaylo exceed Kaylogenerated profits 50 fold. As a matter of law, the enormity of this punishment bears no rational proportion to the gravity of OCF's alleged misdeeds.

c. The Award of Punitive Damages Against OCF Bears No Relationship to Criminal Penalties for Like Conduct in Florida.

Another objective factor available to this Court to gauge the constitutionality of the monetary punishment imposed in the form of punitive damages against OCF is the criminal penalties applicable under Florida law to conduct similar to that allegedly engaged in by OCF here. Cf. *Solem vs. Helm,* 463 U.S. at 291. The jury adjudged OCF liable for punitive damages for its sale and production of asbestos-containing Kaylo. Florida law has long restricted the availability of punitive damages to cases in which private injuries partake of

public wrongs, see *Florida S. Ry. Co. vs. Hirst,* 11 So. 506, 513 (1892), and the Florida Supreme Court has held that "[c]ases in this category may be likened, in general terms, to culpable negligence in criminal proceedings." *Ingram,* 340 So. 2d at 924.

The act of exposing a person to personal injury or inflicting personal injury through acts of culpable negligence, defined as actions showing a reckless disregard for the safety of others has been criminalized in §784.05, Fla. Stat. See *Kimbrough vs. State,* 356 So. 2d 1294 (Fla. 4th DCA 1978). The purpose of the culpable negligence statute is to make criminal those acts which create an unreasonably great risk of harm to others. *State vs. Greene,* 348 So. 2d 3 (Fla. 1977).

The degree of punishment for culpable negligence depends on whether the criminally negligent act results in personal injury. The Florida Legislature has established as a matter of policy that culpable negligence resulting in personal injury is punishable as a misdemeanor of the first degree, with a maximum penalty of $1,000.00 and not more than a one year term of imprisonment. If the injury inflicted by culpably negligent conduct results in death, the offense is categorized as a felony in the second degree, which is punishable by a maximum fine of $10,000.00 and a term of imprisonment not to exceed 15 years. §§782.07, 775.082, 775.083, Fla. Stat.

The Legislature's judginent in setting the penalties for the crime of culpable negligence - which like punitive damages are designed to further the goals of deterrence and punishment - provides a relevant and easily discernible objective standard for assessing the

reasonableness of further awards of punitive damages against OCF. Even adjusting for the fact that OCF, as a corporate entity, could not be sentenced to prison, a punitive award of $8,750,000.00 in this case is completely out of line with the Florida Legislature's current assessment of the level of punishment necessary to exact retribution and achieve deterrence in these circumstances. The disparity between the I-egislature's treatment of analogous, but more severe, criminal offenses, and the punishment imposed against OCF in this case, suggests that the latter does not conform to the Legislature's perception of the appropriate punishment.

2. The Excessive Fines Clause at a Minimum Prohibits Repetitive Monetary Punishments for a Single Course of Tortious Conduct that Threatens Eventually to Deprive a Corporate Defendant Such as OCF of the Ability to Conduct its Business.

Aside from the central rnandate that the imposition of monetary punishment bear some proportion to the gravity of the punishable offense, the Excessive Fines Clause incorporates, and elevates to the level of constitutional prohibition, the historical aversion to fines that threaten a defendant's livelihood. The repeated and unrestrained punishment of OCF for a single course of conduct has produced an aggregate punishment that is not only excessive under any reasonable standard of proportionality, but is also violative of the Excessive Fines Clause because of the

impact of such unremitting punishments pose on OCF over the long term.[14]

Any argument favoring the imposition of further punitive damage awards against OCF must take into

---

[14] Florida courts have considered and rejected the theory that punitive damages should be prohibited in mass products liability cases as a matter of Florida law because their repeated unposition threatens to bankrupt corporate defendants. See *Celotex Corp. vs. Pickett,* 459 So. 2d 375, 377 (Fla. 1st DCA 1984), *approved,* 490 So. 2d 35 (Fla. 1986); *Janssens,* 463 So. 2d at 252-253. Neither of those cases disposes of OCF's constitutional challenges to the further imposition of punitive damages against it, however, because neither case involved a challenge under the Excessive Fines Clause of the Eighth Amendment. Both of these cases raise challenges to punitive damages under the well-known principle of Florida law that punitive damages must be assessed according to the ability of the wrongdoer to pay. See *Janssens,* 463 So. 2d at 253, and *Pickett,* 459 So. 2d at 375, both citing *Arab Termite & Pest Control, Inc. vs. Jenkins,* 409 So. 2d 1039 (Fla. 1982). Numerous Florida decisions, including *Arab Termite,* stand for the proposition that the objectives of punitive damages are served by exacting punishment from the defendant which "will hurt, but not bankrupt." *Hoy vs. Poyner,* 305 So. 2d 306, 307 (Fla. 2d DCA 1974); see aslo, *Wackenhut Corp. vs. Canty,* 359 So. 2d 430 (Fla. 1978); *Fisher vs. City of Miami,* 172 So. 2d 455, 457 (Fla. 1965). But the limitations, or lack thereof, placed on the imposition of punitive damages as a matter of Florida law do not resolve the constitutional arguments the Court now has before it. As a matter of fact, Celotex and Johns-Manville have both entered bankruptcy proceedings, due in large part, to excessive punitive damage awards in product liability asbestos cases. See also, S. Berger, Products Liability and Punitive Damages: An Incompatibility, 1 Trial Adv. Q. 49, 55,-56 (March 1982), in which the undersigned predicted corporate bankruptcies resulting from multiple awards of punitive damages for the same course of conduct.

consideration the compensatory damages and litigation costs that OCF has already incurred. While purely compensatory damages may not fall directly within the purview of the Excessive Fines Clause, the amount of compensatory damages imposed against OCF does bear on OCF's ability to survive the imposition of these unrelenting awards. As of the end of 1993, OCF already had resolved (i.e., settled or paid) approximately 120,000 asbestos personal injury claims. (T 984), leaving approximately 98,000 unresolved, and cases were being filed at an increasing pace. (T 943, 984-988). The total cost of all claims, insured and uninsured, through 1999 is estimated at $1.6 **billion**. (T 991). OCF's uninsured costs of this litigation was $74 million between 1990 and 1993; the cost for 1993 was $59 million, and projected uninsured costs for 1994 were $150 million (T 993). OCF shows a reserve on its balance sheet of $892 million for future claims. (T 994).

Unless this Court recognizes in the context of these cases that the Constitution places a meaningful limit on the amount or number of monetary punishments that can be imposed against a defendant for a single course of conduct, OCF will stand assessed with a monetary punishment of well over $50 million for its production and sale of Kaylo. What is more chilling is that if this Court ignores these constitutional limitations, nothing stands in the way of further debilitating punitive damage awards against OCF. Given the fact that scores of asbestos cases involving punitive damage claims are currently pending against OCF in Florida courts alone, the inevitable result of unrelenting punitive damage awards piled on OCF is inescapable.

Absent judicial action, the function of further punitive damages against OCF will be nothing more than punitive overkill, a function neither contemplated by the traditional understanding of the role of punitive damages, nor constitutionally tolerable under the Excessive Fines Clause of the Eighth Amendment.

Article I, §17 of the Florida Constitution also forbids the imposition of excessive fines. While this provision is primarily "directed to legislative enactments providing for or enabling the imposition of . . . punishments," it is applicable whenever "the punishment provided is disproportionate to the offense." *Eger vs. State,* 291 So. 2d 676, 678 (Fla. 3d DCA 1974), *petition dismissed,* 297 So. 2d 28 (Fla. 1974) [citing *Chavigny vs. State,* 112 So. 2d 910,915 (Fla. 2d DCA) *cert. denied,* 114 So. 2d 6 (Fla. 1959) *cert. denied,* 362 U.S. 922 (1960)]. Because the punitive damages imposed against OCF are disproportionate to any offense allegedly committed by OCF, the awards are barred under the Florida Constitution. See *Amos vs. Gunn,* 84 Fla. 285, 364, 94 So. 615, 641(1922). In addition, because a punitive damage award against OCF has been finally upheld by the Florida courts, *W.R. Grace & Co. - Conn. vs. Doughtery,* 636 SO. 2d 746 (Fla. 2d DCA), review denied, 645 So. 2d 454 (Fla. 1994), imposition of any other punitive damage awards is prohibited by the Double Jeopardy Clause under the reasoning of *United States vs. Halper,* 490 U.S. at 446-451.[15]

---

[15] See aslo Article I, § 9 of the Florida Constitution.

POINT V. FUNDAMENTAL CONCEPTS OF DUE PROCESS AND FLORIDA LAW FORBID THE IMPOSITION OF FURTHER PUNITIVE DAMAGES AGAINST OCF AS PUNISHMENT FOR OCF'S PRODUCTION AND SALE OF KAYLO OVER 20 YEARS AGO.

Although the Excessive Fines Clause is the constitutional provision explicitly addressed to unreasonable monetary penalties, the Due Process Clause also guards against imposition of excessive punitive damages.[16] As the Supreme Court of the United States recently confirmed, "[a] decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment." *Oberg,* 114 S. Ct. at 2342.

It is a fundamental principle that irrational or arbitrary governmental actions violate due process. See, e.g., *Wolff vs. McDonnell,* 418 U.S. 539, *558* (1974); *Pension Benefit Guar. Corp. vs. R.A. Gray & Co.,* 467 U.S. 717, 729 (1984); *Haslip,* 449 U.S. at 18; *Browning-Ferris,* 492 U.S. at 281 (Brennan, J., concurring). Any judicial toleration of further punitive damages against OCF in the circumstances presented would implicate the judicial system in the imposition of arbitrary punishment in violation of due process.

---

[16] Indeed, many of the arguments regarding the applicability of the Excessive Fines Clause to punitive damage awards apply as well to the Due Process Clause.

In *Oberg* and *Haslip*, the Supreme Court emphasized the common law basis of due process constraints on punitive damages. See *Oberg*, 114 S. Ct. at 2355038, 2342 & n. 12; *Haslip*, 499 U.S. at 15-18. At a minimum, such awards must in fact further the underlying purpose for which they were recognized at common law - - to deter and punish the defendant and those similarly situated. *See Halper*, 490 U.S. at 446 n.8. Because, as explained below, no legitimate utility remains in continuing to allow the imposition of staggering monetary punishments against OCF, allowing such awards to stand offends fundamental concepts of due process. At a minimum, the awards of punitive damages below should be subject to a drastic remittitur.[17]

---

[17] The Florida Supreme Court recently opined that it would be disinclined to limit the imposition of punitive damages in asbestos (or other mass tort) litigation because such a decision would "place Floridians injured by asbestos on a unequal footing with the citizens of other states" given that the court's decision would not be "binding on other state courts or federal courts." *W.R. Grace & Co. -- Conn. v. Waters*, 638 So. 2d 502 (Fla. 1994). Of course, any decision by this Court limiting the imposition of punitive damages on federal constitutional grounds would constitute authority for other state and federal courts to cite in support of the imposition of similar limitations. Moreover, to the extent that other courts chose not to follow the lead of this Court, the Supreme Court of the United States would presumably act to resolve any conflicting applications of the United Stated Constitution. To date, the Supreme Court has not considered on the merits whether the repetitive imposition of punitive damages for a single course of conduct violates federal due process.

A. Repetitive Punishments Imposed Against OCF for a Single Course of Conduct Serve No Legitimate Deterrent or Punitive Purpose

Specific deterrence provides no justification for the award of punitive damages in this case. Punitive damage claims against OCF in asbestos personal injury cases arise from OCF's sale and/or manufacture of asbestos-containing Kaylo insulation between 1953 and 1972. OCF ceased making, selling, and distributing that product over 20 years ago. Accordingly, additional punitive damage awards are not needed to deter any further misconduct by OCF.[18]

Neither does the award of punitive damages in this cause advance any rational interest Florida may have in punishing OCF's misconduct. As outlined above, OCF has incurred staggering liability for compensatory and punitive damage awards which far exceeds the profit OCF realized from manufacturing and distributing Kaylo. Society's goals of punishment and deterrence are fully satisfied by the compensatory

---

[18] See *Hoell vs. Anchor Packing Co.*, slip op., No. 90 CV 0667 (Wis. Cir. Ct. Feb, 16, 1993) [Exhibit 11 to McOmber Affidavit] (denying punitive damages against OCF in part because its product "has not been produced for a period of over twenty years"); see also *Campbell v. Combustion Eng'g*, slip op., No. 92 CV 405 (Colo. Dist. Ct. July 20, 1992) [Exhibit 5 to McOmber Affidavit] ("[T]he deterrent effect of punitive damages has already been accomplished in [the asbestos] content."); *Rimlinger v. Johns-Manville Sales Corp.*, slip op., No. C-6340 (Tenn. Cir. Ct. Jan 22, 1982) (recognizing punitive damages as "inappropriate" in asbestos litigation because "the multitude of pending product liability actions serve as sufficient deterrents and punishment . . .").

damages that OCF has paid, and will pay in future years, to asbestos plaintiffs and well as by punitive damages already awarded against OCF. *Cf. Roginsky vs. Richardson-Merrell, Inc.*, 378 F.2d 832, 841 (2d Cir. 1967). Further awards of punitive damages are simply overkill: enough is enough.

Although OCF is a large corporation, the punitive damage awards in these cases are far greater than necessary to punish and deter. OCF has been and will continue to be subject to extraordinary litigation costs as a result of its manufacture of asbestos-containihg products. More than 50 million in punitive damages has been awarded against OCF for the company's involvement with Kaylo.[19] An additional $8.25

---

[19] *In addition to the punitive damages awarded against OCF below, punitive damages have been awarded in:* Adams v. Armstrong World Indus., *Nos. 86-C-763, et al. (W. Va. Cir. Ct., Monongalia Country 1990) ($630,000 awarded to 21 plaintiffs, OCF has paid judgment), cert. denied sub nom.*, Owens-Corning Fiberglas Corp. vs. Adams, *113 S. Ct. 3035 (1993);* Barnes v. Armstrong World Indus., *Nos. 86-C-763, et al. (W.Va. Cir. Ct., Monongalia County 1990) $3,750,000 awarded to 15 plaintiffs, OCF has paid judgment), cert. denied sum nom.*, Owens-Corning Fiberglas Corp. v. Adams, *113 S. Ct. 3035 (1993);* Berry v. Celotex Corp., *Nos. 83-L-11989, 85-L-1 1170 (Ill. Cir. Ct., Cook County 1987) ($25,000 awarded to one plaintiff; case was settled);* In re consolidated Asbestos Cases, *No., 92-16334-CA (Fla. 4th DCA 1993) ($5,000,000 awarded to two plaintiffs; OCF is preparing post-trial motions);* Davis v. Celotex Corp., et al., *No. 86-C-763 (W.Va.Cir. Ct., Monongalia County 1989) ($280,000 awarded to two plaintiffs; case was settled);* Dunn v. Owens-Corning Fiberglas Corp., *774 F. Supp 929 (D.I.V. 1991) ($25,000,000 awarded to one plaintiff remitted to $2,000,000), aff'd in part and rev'd in part*

sub nom., Dunn v. Hovic, *1 F.3d 1371 (3d Cir. 1993) (en banc) (award further remitted to $1,000,000), cert. denied, 114 S. Ct. 650 (1993);* Gizzi v. Celotex Corp., et al., *No. C-1-84-961 (S.D. Ohio 1987) ($2,000,000 was awarded to one plaintiff; case was settled); Gravina v. Owens-Corning Fiberglas Corp., No. 90-1815-CIV-RYSKAMP (S.D. Fla. 1991) ($10,000 awarded to two plaintiffs; case was settled);* Jadlowski v. A. C. & Sons, Inc., *No. L0703-9 1 (N.J. Supp. Ct., Middlesex County 1993) ($15,000,000 awarded to one plaintiff remitted to $2,500,000; OCF is preparing an appeal);* Koster v. Owens-Corning Fiberglas Corp., *No. 93-CI-00302 (Ky. Cir. Ct., McCracken County, 1993) ($500,000 awarded to one plaintiff; OCF's post-trial motions are pending); Pickering v. Owens-Fiberglas Corp., Nos. 90- L-1546, et al. (Ill. Cir. Ct., Madison County 1992) ($7,500,000 awarded to four plaintiffs), aff'd, 638 N.E.2d 1127 (Ill. Ct. App. 1994);* In re Guam Asbestos Litig. (Brennan v. Owens-Corning Fiberglas Corp.) *No.CV986-86 (Guam Sup. Ct. 1992) ($4,500,000 awarded to one plaintiff; OCF has appealed);* Reneau v. Green, *Nos. 87-L-870, et al. (Ill. Cir. Ct., Madison County 1990) ($5,000,000 awarded to five plaintiffs; OCF has paid judgment), aff'd sub nom.*, Koch an vs. Owens-Corning Fiberglas Corp., *242 Ill. App. 3d 781, 610 N.E. 683 1993), petition for leave to appeal denied, 152 Ill. 561, 622 N.E. 2d 1208 (Ill. 1993), cert denied, 127 L. Ed 2d 565 (U.S. 1994);* Ripa v. Keene Corp., *No. L-92337-87 (N.J. Sup. Ct., Camden County 1993) ($5,500,000 awarded to one plaintiff; OCF has appealed);* Schiavo v. GAF Corp., *No. L-07636-88 (N.J. Sup. Ct., Camden County 1993) ($100,00 awarded to one plaintiff; OCT has filed post-trial motions);* Schoenian v. Owens-Corning Fiberglas corp., *No. 87-C-775-Br (W. Va. Cir. Ct., Ohio County 1989) $3,900,000 awarded to tltree plaintiffs; case was settled);* Skadan v. Owens-Corning Fiberglas Corp., *Nos. H-94314, H-89278 (N.Y. Supp. Ct., Erie County 1990) ($130,000 awarded to two plaintiffs; case was settled);* Smith v. Owens-Corning Fiberglas Corp., *No. 87-L-293 (Ill. Cir. Ct., McLean County 1993) ($50,000 awarded to one*

million in punitive damages is wholly unnecessary to punish or deter. In these circumstances, it is untenable to suggest that further massive punishment is necessary to deter OCF from making a product that is ceased to produce 20 years ago and will never manufacture again. *Magallanes vs. Superior Court,* 213 Cal. Rptr. 547, 552, review denied, (Cal. July 10, 1985) ("[T]he

---

plaintiff; case was settled); Spaur v. Owens-Corning Fiberglas Corp., *No. CLA-028 (Iowa Dist. Ct., Polk County 1992) ($1,500,00 awarded to one plaintiff; OCF has paid judgment); aff'd, 510 N.W. 2d 854 (Iowa 1994);* Watson v. Owens- Corning Fiberglas Corp., *No. 12292-RC (Va. Cir. Ct., City of Newport News 1990) ($100,000 awarded to one plaintiff; case was settled), aff'd, 243 Va. 128, 413 S.E. 2d 630 (1992);* Wheeler v. Owens-Corning Fiberglas Corp., *Nos. 85-44370, et al. (Tex. Cir. Ct., Harris County 1992) ($60,000 awarded to two plaintiffs, OCF has appealed);* Williams v. A.C. & S., Inc. *(Tex. Dist. Ct., Harris County 1993) ($2,000,000 awarded to ten plaintiffs; OCF is preparing an appeal).*

In yet another case, the jury awarded plaintiffs approximately $2.5 million in compensatory damages and also found OCF liable for punitive damages in an amount to be determined during a later phase of trial. *Armstrong vs. Keene Corp.,* No. 88208502 (Md. Cir. Ct., Baltimore City, July 26, 1989). OCF Settled the case before determination of punitive damages, but a substantial portion of the settlement was designed to cover them. See *Owens-Illinois, Inc. v. Armstrong,* 87 Md. App. 699, 591 A.2d 544 (1991), aff'd in part and rev'd in part, 326 Md. 107, 604 A.2d 47, cert. denied, 113 S. Ct. 204 (1992). Most recently, in *Crane vs. Owens-Corning Fiberglas,* Case No. 92-20924-42 (11th Judicial Circuit, Dade County, Florida) the jury awarded $666,000.00 in punitive damages on March 6, 1995. An appeal will be taken to the Third District.

objective of deterrence has little relevance where the offending goods have long since been removed from the marketplace.").

Moreover, although courts may award punitive damages "to deter the commission of similar acts in the future," *St. Regis Paper Co.*, 428 So. 2d at 247, no such additional deterrence is warranted here. Those in the business community and the public at large are well aware of the tens of billions of dollars in indemnity costs that OCF and other asbestos defendants have incurred and will continue to incur. They also know about the asbestos-related bankruptcies of companies representing more than half of the historical liability in asbestos litigation. See, e.g., Oliver & Spencer, "Who Will the Monster Devour Next?" *Forbes*, Feb. 19, 1991, at 75. Punitive damage awards in this context do nothing more than escalate the already bloated transactional costs of a system that has proven to be only marginally effective in securing compensatory damages to persons who have allegedly suffered injury from their contact with asbestos products.

Multiple punishments for a single course of conduct have been recognized by several courts to constitute the very type of unconstrained and excessive punishment that due process prohibits.[20] The rationale driving these decisions mirrors the reasoning of Florida courts in consistently disallowing as an "excessive

---

[20] See, e.g. *In re School Asbestos Litig.*, 789 F.2d 996, 1003-05 (3d Cir.), cert. denied, 479 U.S. 852 and 479 U.S. 915 (1986); *Juzwin vs. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1061, (D.N.J.), vacated on other grounds, 718 F. Supp. 1233 (D.N.J. 1989).

penalty" awards of both treble damages and punitive damages for the same act.[21]

The Court's decision in *Oberg* confirms that meaningful judicial review of the excessiveness of a punitive damage award is constitutionally required. 114 S. Ct. at 2341-42. The trial court's review of the punitive damage award here was not meaningful

---

[21] See *Trend Setter Villas of Deer Creek vs. Villas on Green, Inc.*, 569 So. 2d 766, 767 (Fla 4th DCA 1990) (finding trial court's award of both treble and punitive damages to constitute "add double recovery and an excessive penalty"); *Cutler vs. Pelletier*, 507 So. 2d 676, 679 (Fla 4th DCA (reversing punitive damages award because the "award of both treble and punitive damages amounts to a double recovery for the appellees, and an excessive penalty to the appellant"), review denied, 518 So. 2nd 1277 (Fla. 1987); *Blll Terry's, Inc. vs. Atlantic Motor Sales, Inc.*, 409 So. 2d 508, 509 (Fla. 1st DCA 1982) ("We agree . . .that an award of both treble damages and punitive damages for the same act amounts to a double recovery or an excessive penalty.") Indeed, five members of the thirteen judge Third Circuit Panel setting en banc in *Dunn vs. Hovic*, 1 F. 3d 1371 (3d Cir.), cert. denied, 114 S. Ct. 650 (1993), declared that additional punitive damages awards against OCF violate due process and/or Virgin Island territorial law because the amounts already awarded in prior litigation have been more than adequate to punish and deter. See id. at 1393-1405 (Weis, J., dissenting, joined by Greenberg, Hutchinson & Scirica, JJ.) (punitive damage awards against OCF violate due process and Virgin Island Law), id. at 1405 (Becker, J., dissenting) (punitive damage awards against OCF violate due process). Although the majority in Dunn declined to strike the punitive damage award in its entirety, the en banc Court approved a remittitur of a $25 million punitive damage award to $1 million on the ground that "the district court gave insufficient consideration to the effect of successive punitive awards in asbestos litigation." Id. at 1391.

because in rejecting OCF's motion to strike punitive damages or for directed verdict, the trial court gave no apparent consideration to the effect of successive punitive damage awards against OCF. This Court should hold that no further punitive damages whatsoever should be allowed against OCF as a matter of law, or, at a minimum, should reduce the amount of the award.

B. The Passage of Nearly Two Decades Since OCF's Allegedly Tortious Conduct Extinguishes Any Remaining State Interest in Punishing OCF

It has long been recognized in American jurisprudence that society's interest in punishment and deterrence for a particular wrongdoing fades with the passage of time. For example, in rejecting an argument that a federal two year statute of limitations did not apply to an action to collect a criminal fine, Chief Justice Marshall observed:

> In expounding this law, it deserves some consideration, that if it does not limit actions of debt for penalties, those actions might, in many cases, be brought at any distance of time. This will be utterly repugnant to the genius of our laws. In a country where not even treason can even be prosecuted after a lapse of three years, it could scarcely be supposed, that an individual would remain forever liable to a pecuniary forfeiture.

Adams vs. Wood, 6 U.S. (2 Cranch) 336, 342 (1805).[22]

Contemporary cases continue to recognize the temporal diminution of society's interest in punishment and deterrence. In *Toussie vs. United States,* 397 U.S. 112, 114-15, (1970), the Supreme Court explained the rationale for statutes of limitation from criminal offenses:

> The purpose of a statute of limitation is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.

See also *United States vs. Scharton,* 285 U.S. 518, 522 (1932) (limitations in criminal actions are to be "liberally interpreted in favor of repose"); *United States vs. Habig,* 390 U.S. 222, 227 (1968). Moreover, the Supreme Court has recognized that the policies behind civil statutes of limitation are in many ways similar to those underlying their criminal

---

[22] To similar effect are *M'Cluny vs. Silliman,* 28 U.S. (3 Pet.) 270, 278-70 (1830); *Bell vs. Morrison,* 26 U.S. (1 Pet.) 351, 360; *Wetzell vs. Bussard,* 24 U.S. (11 Wheat.) 309 (1826); *Clementson vs. Williams,* 12 U.S. (8 Cranch) 72 (1814).

counterparts. *United States vs. Marion,* 404 U.S. 307, 322 & n.14 (1971).

Courts and legislatures recognize that societal interest in punishment and deterrence eventually becomes so faded that it is no longer rational to prosecute the accused wrongdoer. In Florida, the statute of limitations for prosecuting personal injuries caused by felony culpable negligence, the closest criminal counterpart to OCF's alleged misconduct here, is three years from the commission of the offense. §775.15, Fla. Stat.[23]

The policy justifications underlying statutes of limitation are particularly pertinent in determining whether a punitive award is appropriate for alleged misconduct of a corporation. As time passes, the management of a corporation is replaced and new individuals and entities become shareholders. Thus, the award of punitive damages many years after an alleged corporate wrong occurred does not punish the corporate officials who were involved in the alleged misconduct or the stockholders who benefited from any profit obtained from the alleged wrongdoing. Rather, such an award penalizes the current management and shareholders, many of whom had no involvement whatsoever with the company at the time of the alleged misconduct. While this court has held that these considerations do not prohibit the imposition of punitive damages in mass marketed products litigation

---

[23] Moreover, the evidence adduced at trial establishes that MR. DUDLEY's last possible exposure to Asbestos-containing products occurred more than 23 years ago.

as a matter of law, see *Janssens,* 463 So. 2d at 253, *Janssens* in no way bars a conclusion that the continued imposition of punitive damages against *OCF* offends due process in the circumstances presented.

C. The Punitive Award is Excessive Because OCF Complied With Existing Government and Industry Safety Standards

Punitive damages do not serve a legitimate deterrent or retributive function where, as here, the defendant is being punished for conduct that complied with applicable government and industry safety standards. In this case, OCF presented evidence that various tests conducted in the 1960's uniformly concluded that Kaylo could be manufactured, cut, and used safely without exceeding the threshold limit value of *5* million asbestos particles per cubic foot recommended by the American Conference of Governmental Industrial Hygienists and adopted by most jurisdictions, including Florida, New Jersey (where OCF manufactured Kaylo) and Ohio (where OCF's headquarters were located). There was no evidence offered at trial that DUDLEY suffered occupational exposures to asbestos that exceeded the recognized threshold limits at the time. In fact, the undisputed testimony of industrial hygienist Jack Peterson was that workers who were occupationally exposed to asbestos in the 1950's and the 1960's were exposed to concentrations that were less than the threshold limit values accepted at the time. (T 1119). Moreover, it is undisputed that when OSHA promulgated a regulation in 1972 requiring the labeling of asbestos products, the label already being

used on OCF Kaylo fully complied with the regulation.[24]

OCF's compliance with the applicable government and industry standards negates any basis for the imposition of punitive damages in this case, and rendered the punitive award plainly excessive.[25]

---

[24] Indeed, according to the excluded testimony of Jerry Helser, as late as the 1970's the federal government actually insisted on specifications in government contracts that could only be met by products containing asbestos. See Exhibit 43, pp. 1627-1630. In addition, OCF was in full compliance with the Walsh Healy Act which adopted the ACGIH TLV's for the 1952- 1970 period. (T 1113).

[25] See, e.g., *Richards vs. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994) (finding insufficient evidence to support imposition of punitive damages in light of due care shown by defendant's compliance with federal safety standards), cert. denied, 115 S. Ct. 902 (1995); *Drabik vs. Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993) ("Compliance with industry standard and custom serves to negate conscious disregard and show that the defendant acted with a nonculpable state of mind with no knowledge of a dangerous design defect."); *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1378 (5th Cir. 1982) (en banc) (finlng a $10 million punitive award excessive and remanding for further consideration in light of the fact that defendant's design comported with design of all other members of the industry), appeal on remand, 722 F.2d 1238, 1242 (affirming remittitur of punitive award to $450,000), modified on other grounds, 727 F.2d 350 (5th Cir. 1984); *Sloman vs. Tambrands, Inc.*, 841 F.Supp. 699, 703-04 n.8 (D. Md. 1993) (compliance with federal regulations precludes finding of malice and necessitates entry of summary judgment on claim for punltive damages); *Liesener v. Weslo, Inc.*, 775 F. Supp. 857, 861-62 (D. Md. 1991) ("it is not reckless conduct for manufacturers to follow accepted industry standards, even if counsel has urged a more cautious approach"); *Stone*

Accordingly, the award of punitive damages against OCF below should be overturned or, at a rninimum, substantially remitted.

Man, Inc. v. Green, 435 S.E. 2d 205, 206 (Fla. 1993) (holding that, in general, behavior sufficient to support an award of punitive damages is not shown where defendant complied with applicable governmental regulations).

CONCLUSION

Based upon the foregoing reasons and authorities, it is respectfully submitted that the amended final judgment rendered in favor of DUDLEY and against OCF must be reversed. The trial court committed reversible error in refusing to apply the *Fabre* doctrine and committed prejudicial error in overruling OCF's objection to the use of the Thomas deposition and in refusing to continue the case for one day to allow OCF to present a critical witness. Additionally, the imposition of punitive damages against OCF violated well-established principles found in the United States and Florida constitutions. OCF has been repeatedly punished for the same course of conduct in violation of the Excessive Fines provision of the United States Constitution, the Due Process clause of the United States Constitution and comparable provisions, including the double jeopardy clause, found in the Florida Constitution. The judgment for punitive damages must be reversed in its entirety.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this day of March, 1995, to John F. Venable, Esquire, 205 South Hoover Boulevard, Suite 403, Tampa, Florida 33609.

CROSBY, SAAD, BEEBE
& CRUMP
Post Office Drawer 850249
Mobile, Alabama 36685
-AND-
BERGER & CHAFETZ
Suite 1500, NationsBank Bldg.
9350 South Dixie Highway
Miami, Florida 33156
(305) 670-3404

By: s/_____
Steven R. Berger
Florida Bar No. 117402

**IN THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT OF FLORIDA**

OWENS-CORNING FIBERGLAS CORPORATION,

Appellant,

vs.

CLARENCE DUDLEY and GEORGIANNA DUDLEY,

Appellees.

CASE NO. 94-02059

Lower Tribunal
Case No. 93-9601

REPLY BRIEF OF APPELLANT

CROSBY, SAAD, BEEBE & CRUMP
Post Office Drawer 850249
Mobile, Alabama 36685
-AND
BERGER & CHAFETZ
Attorneys for OCF
Suite 1500,
NationsBank Building
9350 South Dixie Highway
Miami, Florida 33156

TABLE OF CONTENTS

Page

INTRODUCTION 103

STATEMENT OF CASE AND FACTS 103

ARGUMENT 105

POINT I. WHERE THERE IS EVIDENCE THAT NEGLIGENCE OF NON-PARTIES SUBSTANTIALLY CONTRIBUTED TO A PLAINTIFF'S INJURIES, THE TRIAL COURT ERRS IN REFUSING TO ALLOW THE JURY TO CONSIDER THE NEGLIGENCE OF THE NON-PARTIES AND IN FAILING TO INCLUDE THEM ON THE VERDICT FORM 105

POINT II. WHERE A WITNESS IS SHOWN TO BE INCOMPETENT, HIS TESTIMONY SHOULD NOT BE ADMITTED; ALTERNATIVELY, EVEN IF A WITNESS IS MARGINALLY COMPETENT TO TESTIFY, *ARGUENDO*, IF THE PREJUDICIAL EFFECT OF HIS TESTIMONY WILL OUTWEIGH THE PROBATIVE VALUE, IT SHOULD BE EXCLUDED FROM JURY CONSIDERATION. 106

POINT III. THE COURT ERRED IN REFUSING TO CONTINUE THE TRIAL FOR ONE DAY TO ALLOW OCF TO PRESENT CRITICAL TESTIMONY OR, ALTERNATIVELY, IN REFUSING TO ALLOW OCF TO USE A TRANSCRIPT OF THE WITNESS'S TESTIMONY FROM A PRIOR TRIAL. 106

CONCLUSION 117

TABLE OF AUTHORITIES

Page

CASES

Baione vs. Owens-Illinois, Inc., 599 So. 2d 1377 (Fla.2d DCA 1992)..... 15

Brown vs. Board of Education, 347 U.S. 483 (1954)..... 18

Brown vs. State, 206 So.2d 377 (Fla. 1968)..... 9

Browning-Ferris Indus. of Vt., Inc. vs. Kelco Disposal, Inc., 492 U.S. 257 (1989)..... 13

Carrera vs. Carrera, 641 So.2d 199 (Fla. 4th DCA 1994)..... 11

Celotex Corp. vs. Pickett, 490 So. 2d 35 (1986)..... 15

Hicks vs. State, 622 So. 2d 14 (Fla. 5th DCA 1993).....

Hockensmith vs. Waxler, 524 So.2d 714,715 (Fla. 2d DCA 1988)..... 17

Hunt vs. State, 613 So. 2d 893 (Fla. 1993)..... 9

Pacific Mutual Life Ins. Co. vs. Haslip, 499 U.S. 1(1991)..... 16

St. Regis Paper Co. vs. Watson, 428 So. 2d 243 (Fla. 1983)..... 17

State vs. Heathcoat, 442 So. 2d 955 (Fla. 1983) 10

Strong vs. ML Dora Growers Co-Op., 495 So. 2d 1238 (Fla. 5th DCA 1986) 9

Sutter vs. Hammond, 545 So. 2d 497 (Fla. 4th DCA 1989) 17

Thomas vs. State, 419 So.2d 634 (Fla. 1982) 9

Vaides vs. State, *626* So. 2d 1316 (Fla. 1993) 11

W.R. Grace & Co.-Conn. vs. Waters, 638 So. 2d 502 (Fla. 1994) 16

STATUTES

§ 768.81(3), Fla. Stat. (1989) 7

Section 768.73, Fla. Stat. 14

INTRODUCTION

This Reply Brief is submitted on behalf of the Appellant, OWENS-CORNING FIBERGLAS CORPORATION ("OCF") in response to Appellees' brief. The same symbols and introductory remarks contained in the Initial Brief of Appellant shall apply in this brief. All arguments and statements are readopted and realleged. The failure to respond to any particular statements or arguments in Appellees brief should not be deemed a waiver of any of OCF's arguments or acquiescence in those arguments or statements.

Based upon the reasons and authorities contained in the Initial Brief as well as this Reply Brief, Appellant submits that the amended final judgment must be reversed and the cause remanded with directions to grant a new trial on all issues, or alternatively, enter judgment in favor of OCF on the issue of punitive damages, and submit the balance of the case to retrial.

STATEMENT OF CASE AND FACTS

Appellees take no issue with the statement of case and facts contained in the Initial Brief of Appellant. In the argument portion of the brief, however, Appellees do make several statements and arguments relative to OCF's argument that the trial court erred in refusing to continue the trial for one day to allow OCF to present the critical testimony of Mr. Jerry Helser. Contrary to Appellees' attempt to characterize OCF's argument as a mere afterthought, the record shows that OCF not only raised the issue during trial, but the following was argued in OCF's post-trial motion:

> "19. The court committed reversible error in refusing to grant defendant a continuance of one day to allow a witness to be present and in

> refusing to allow the defendant to read the trial testimony of Mr. Jerry Helser given in trials in which this defendant and plaintiffs counsel were involved before this Court within the last several months."

Quite clearly, OCF advised the trial court of its significant scheduling problem during the trial (T 783-784), and post-trial, OCF pointedly requested a new trial because of the failure of the trial court to grant a one-day continuance.

Furthermore, in Appellees' argument, a statement is made that OCF "has over 17,000 employees (R 1092-1160)" and that none of those 17,000 employees were proffered as witnesses by OCF at trial(Answer Brief, p. 32). Whether OCF has 17,000 employees is irrelevant. There was very specific, direct and critical evidence that could have been presented by Mr. Helser had he been allowed to testify. That evidence and testimony is outlined in the Initial Brief. By implication, at least, Appellees seem to believe that any one of the 17,000 employees, perhaps a parking lot attendant, could have been easily substituted for Mr. Helser. Appellees made no such assertion in the trial court, nothing in the record supports that assertion, and it is therefore an inappropriate assertion for Appellees to advance in this Court.

It is also clear from a reading of the transcript that counsel for OCF was seeking relief from the trial court because Mr. Helser was unavailable and "tied up" in trial in Texas. Appellees claim that OCF did not use magic language" in addressing the issue and that semantic hair splitting should be the basis for this Court's decision. Respectfully, this Court need only read the trial court's statement that he "**wanted** to finish the trial" (T 788) by Friday because one juror had already become sick. OCF was faced with a judge who was determined to conclude the case

by Friday notwithstanding the unfairness and prejudice to OCF and a plaintiff gloating at the fact that OCF would be unable to produce a material witness.

On the issue of punitive damages, OCF noted that as of June, 1993, judgments had been entered against OCF awarding over $57,000,000 in punitive damages OCF also noted that the two most recent issues of Mealey's Litigation Reports (Asbestos) reported another S14,600,000 in punitive damage awards against OCF. Although the number may pale by significance, two of the more recent issues of Mealey's Litigation Reports (Asbestos) (April 21, 1995; May 5, 1995) mention another 5766,000 in punitive damage awards against OCF. It is important to note that hardly a week passes without a substantial compensatory or punitive award against OCF in some state or federal jurisdiction.

ARGUMENT

POINT I. WHERE THERE IS EVIDENCE THAT NEGLIGENCE OF NON-PARTIES SUBSTANTIALLY CONTRIBUTED TO A PLAINTIFF'S INJURIES, THE TRIAL COURT ERRS IN REFUSING TO ALLOW THE JURY TO CONSIDER THE NEGLIGENCE OF THE NON-PARTIES AND IN FAILING TO INCLUDE THEM ON THE VERDICT FORM.

OCF relies on its Initial Brief in support of its argument that the trial court erred in refusing to allow apportionment of liability pursuant to § 768.81(3), Fla. Stat. (1989). Space limitations prevent further response.

POINT II. WHERE A WITNESS IS SHOWN TO BE INCOMPETENT, HIS TESTIMONY SHOULD NOT BE ADMITTED; ALTERNATIVELY, EVEN IF A WITNESS IS MARGINALLY COMPETENT TO TESTIFY, *ARGUENDO,* IF THE PREJUDICIAL EFFECT OF HIS TESTIMONY WILL OUTWEIGH THE PROBATIVE VALUE, IT SHOULD BE EXCLUDED FROM JURY CONSIDERATION.

OCF relies on its initial Brief with reference to Point II. Once again, space limitations do not allow full response but OCF continues to believe that the trial court erred in allowing the Thomas deposition to be read to the jury. Either Mr. Thomas was incompetent or the probative value of the deposition was far out weighed by the unfair prejudice or the confusion created by the reading of the obviously confused testimony of Mr. Thomas. A new trial is warranted.

POINT III. THE COURT ERRED IN REFUSING TO CONTINUE THE TRIAL FOR ONE DAY TO ALLOW OCF TO PRESENT CRITICAL TESTIMONY OR, ALTERNATIVELY, IN REFUSING TO ALLOW OCF TO USE A TRANSCRIPT OF THE WITNESS'S TESTIMONY FROM A PRIOR TRIAL.

Appellees' response is basically twofold: (1) OCF never really requested a continuance, and (2) even if a continuance had been requested, it was not error to deny a continuance. Appellees are wrong on both counts.

The trial court made it quite clear that no continuance would be granted (T 788) because one juror had already become sick and the court might risk a mistrial by continuing the case over the weekend. While no "magical" language was used by counsel for OCF, it is quite obvious that counsel was

seeking a short continuance (not an indefinite continuance as asserted by Appellees) because the corporate witness was in trial in Texas. Certainly the denial of a continuance was argued in post-trial motions (R 723-726) and OCF's argument that it was prejudiced by the trial court's failure to grant a continuance is not merely an appellate afterthought.

A number of cases have made it clear that specific objections or motions need not always be made in order to preserve issues for appellate review if a trial court has already announced a decision and further attempts to seek relief would be fruitless. For example in ***Thomas vs. State,*** 419 So.2d 634 (Fla. 1982), an attorney had attempted to object during closing argument but the trial court refused to allow the objection and refused to allow a motion concerning the objection to be made after the jury was excused. The Fifth District held that counsel had waived any objection for purposes of appellate review by failing to state the objection and failing to obtain a ruling from the court. The Supreme Court disagreed and quoted from ***Brown vs. State,*** 206 So.2d 377, 384 (Fla. 1968) to the effect that "[a] lawyer is not required to pursue a completely useless course when the judge has announced in advance that it will be fruitless."

Likewise, in ***Hicks vs. State,*** 622 So.2d 14 (Fla. 5th DCA 1993) the court held that a party did not waive the right to argue the failure to give a requested jury instruction when the trial court had already "stated his intention not to give the requested charge. . ." Id. at 17. In ***Strong vs. ML Dora Growers Co-Op.,*** 495 So. 2d 1238 (Fla. 5th DCA 1986), the court held that a party did not waive the right to argue a particular point on appeal because the party failed to use the magic words, "I object." Id. at 1240. See also, ***Hunt vs. State,*** 613 So. 2d 893 (Fla. 1993) (Supreme Court could grant relief to defendant for breach of plea bargain agreement despite the absence of formal motion to enforce plea bargain agreement); ***State vs. Heathcoat,*** 442 So. 2d 955 (Fla. 1983)

(once an instruction is requested, and trial court understands nature of instruction, further objection is pointless and unnecessary to preserve issue for appellate review).

The colloquy between OCF and the trial court made it abundantly clear that the trial court had no intention of granting a continuance. No magic language was necessary. The trial court erred in refusing to continue the case over the weekend to allow OCF to present the testimony of its critical corporate witness. The nature of the testimony that would have been given by Mr. Helser is outlined in OCF's Initial Brief. Appellees were well aware of the nature of Helser's testimony, their counsel having repeatedly cross-examined him in other cases. That testimony was not only critical to OCF's ability to show its efforts to replace asbestos fibers in Kaylo (Exhibit 43, pp. 1639, 1642, 1648), but would have also precluded Appellees' argument to the jury that OCF was willing to spend millions of dollars on defense of these cases but did not even bother to send a corporate witness to the trial(T 1216-1218,1282)The extraordinary size of the verdict returned by the jury clearly demonstrates the effectiveness of, and extreme prejudice inherent in, that type of argument.

Appellees make the absurd statement that OCF employs 17,000 people and it surely could have found someone to testy. First of all, Mr. Helser was the listed and anticipated corporate representative. Beyond that, he is the only remaining OCF employee from the time period when OCF was attempting to remove asbestos fibers from Kaylo. (Exhibit 43, p. 1617). The number of employees of OCF is hardly relevant to the issue whether Helser's testimony was critical to OCF's case.

As this Court is aware, and as Appellees acknowledge, OCF is engaged in litigation throughout the county. In any given week, it would be unusual to find that OCF was not defending itself at trial in some state or federal

jurisdiction. OCF has no control over the docketing or scheduling of cases by judges in the various jurisdictions. Consequently, Appellees' suggestion that OCF has the ability to orchestrate where and when its witnesses will be needed is unquestionably incorrect. There is nothing unusual about two trials taking place at the same time in two different states, here, Texas and Florida, and there is nothing unusual about the conflict presented by the instant case. It takes a quantum leap in logic to accept Appellees' statement that OCF was at "fault" because it "made a conscious decision to send Mr. Helser to Texas, and not to Tampa[.]." (Answer Brief, p. 31).[1]

The cases cited by Appellees are inapposite. None deal with mass tort litigation where a single defendant is on trial on the same issues in multiple jurisdictions at the same time. Furthermore, they generally do no more than state the obvious - that a trial court has discretion in granting or denying a continuance. ***Carrera vs. Carrera,*** 641 So.2d 199 (Fla. 4th DCA 1994) recites that the party seeking a continuance. . . was substantially at fault for the difficulties with his counsel." No other facts are recited in the decision, ***Vaides vs. State,*** *626* So. 2d 1316 (Fla. 1993) was an appeal in a first-degree murder, death sentence case. The defendant raised multiple issues on appeal, including allegations regarding his court appointed counsel, disruptive outbursts by the defendant during hearings, alleged threats, complaints

---

[1] Of course, had Helser testified in Tampa, it is obvious that OCF would have faced the same problem in, Texas with the same resulting prejudice. Could plaintiff's counsel in Texas have argued that OCF was at "fault" for sending Helser to Florida?

about media coverage, and the like. The defendant refused even to talk to the psychologist retained by defense counsel to testify at the penalty phase of the trial and quite clearly "under these circumstances" in conjunction with the multiple aggravating factors involved in the murder, the Supreme Court refused to find an abuse of discretion when faced with an allegation that the defendant required a continuance in order to compel the attendance of certain family members at the penalty phase. Neither these cases, nor any others cited by Appellees are sufficient to justify the abuse of the trial court's discretion in denying a one day continuance so that OCF's intended corporate witness could present evidence critical to both the issue of liability and punitive damages.

Respectfully, the trial court abused its discretion in denying OCF's request for a one day continuance. OCF was denied a fundamentally fair trial both because the jury was not able to hear critical testimony and because Appellees were then able to convince the jury that OCF cared so little about the trial that it chose not to send a witness to testify. The size of the verdict returned by the jury clearly demonstrates the prejudice.

POINTS IV AND V. THE PUNITIVE DAMAGE AWARD IMPOSED AGAINST OCF VIOLATES THE EXCESSIVE FINES CLAUSE OF THE UNITED STATES CONSTITUTION AS A MATTER OF LAW, FURTHER FUNDAMENTAL CONCEPTS OF DUE PROCESS AND FLORIDA LAW FORBID THE IMPOSITION OF FURTHER PUNITIVE DAMAGES AGAINST OCF AS PUNISHMENT FOR OCF'S PRODUCTION AND SALE OF KAYLO OVER 20 YEARS AGO.[2]

OCF has argued that repetitive awards of substantial punitive damages against it for alleged conduct occurring many years in the past violates the Eighth Amendment of the United States Constitution, the due process clause of the Fourteenth Amendment, and the like provisions of the Florida Constitution. To a large extent, Appellees merely counter that prior cases have not as yet adopted OCF's constitutional arguments and, therefore, there is no occasion to revisit the issues. Such an argument assumes that the law is stagnant.

In ***Browning-Ferris Indus. of Vt., Inc. vs. Kelco Disposal, Inc.***, 492 U.S. 257 (1989) the United States Supreme Court did not reject arguments of the type now

---

[2] Space limitations in a reply brief make it impossible for OCF to follow the format of the Initial Brief, including headings and subheadings for Points IV and V addressing OCF's constitutional challenges to the award of punitive damages against it. Consequently, OCF readopts all arguments in these two points. including all subheadings, but will respond to the Answer Brief in a general manner.

being made by OCF, nor is that case dispositive as Appellees assert. Specifically, the Court wrote:

> To decide the instant case, however, we need not go so far as to hold that the Excessive Fines Clause applies just to criminal cases. Whatever the outer confines of the clause's reach may be, **we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."**

492 U.S. at 263-64. The State of Florida has a "right to receive a share of the [punitive] damages awarded" by virtue of Section 768.73, **Fla. Stat.** and is the recipient of millions of dollars annually in judgments or settlements of awards of punitive damages.[3] Neither ***Browning-Ferris*** nor any of the other cases decided by the United States Supreme Court[4]

---

[3] Appellees ridicule OCF's argument that Section 768.73 implicates the Eighth Amendment because the statute places a presumptive but not absolute limitation on punitive damages. The presumptive limitation to a multiple of the compensatory award may be a step in the right direction, but for these purposes the statute is significant because it vitiates a significant part of the ***Browning, Ferris*** rationale for refusing to apply the Eighth Amendment to awards of punitive damages solely between private citizens.

[4] E.g., ***Austin vs. United States,*** 113 S. Ct. 2801(1993) (stating that ***Browning-Ferris*** left open the question of

[Footnote continued on next page]

have addressed the application of the Eighth Amendment in a specific case involving an award of punitive damages partially to a state government. Likewise, none of the Supreme Court cases have addressed this issue in the context of multiple substantial awards of punitive damages, portions of which are payable to the state, in mass tort litigation.[5] At best, the issue remains unsettled.

Interestingly, Appellees also rely heavily on this Court's decision in ***Baione vs. Owens-Illinois, Inc.***, 599 So. 2d 1377 (Fla. 2d DCA 1992). What Appellees conveniently ignore is that this Court felt constrained to allow punitive damages in asbestos litigation because of absence of authority to the contrary. However, two of the three judges concurring in the ***Baione*** decision agreed only "reluctantly" and questioned the "fundamental fairness" of imposing punitive damages on corporations for conduct occurring many years in the past. **Id.** at 1380. Furthermore, as Judges Altenbernd and Hall pointed out in their concurring opinion, the earlier decision in ***Celotex Corp. vs. Pickett,*** 490 So. 2d 35 (1986) (successor corporation liable for punitive damages stemming

---

[Footnote continued from previous page]
whether the excessive fines clause applies only to criminal cases: funding that clause applies to ***in rem*** civil forfeitures)

[5] Contrary to Appellees' belief that ***Browning, Ferris*** "did not turn on who ultimately received the money" (Brief, p. 38), the Supreme Court appeared to find that there is a real constitutional distinction between receipt of the money by private citizens as opposed to the state. (". . . nor [does the state] have any right to receive a share of the damages awarded.") 492 U.S. at 263-64.

from conduct of predecessor corporation), included two strong dissents with which a majority of the ***Baione*** court seemed inclined to agree.

Appellees' contention that ***W.R. Grace & Co.-Conn. vs. Waters,*** 638 So. 2d 502 (Fla. 1994) is dispositive of OCF's punitive damages arguments is flatly incorrect. While the ultimate decision in ***Waters*** was a rejection of the discreet arguments made by W.R. Grace, it is important to recognize that no punitive damages had as yet been assessed in that case and the Florida Supreme Court specifically found Grace's reliance on ***Pacific Mutual Life Ins. Co. vs. Haslip,*** 499 U.S. 1(1991), to be premature. Furthermore, the Supreme Court recognized that its decision was not dispositive of any due process arguments by virtue of **its suggestion** that defendants could "build a record for a due process argument based on the cumulative effect of prior awards [.]" 638 So.2d at 506, at the newly established punitive damage phase of litigation. This latter statement by the Supreme Court anticipated future due process challenges and neither rejected them nor gave any indication that Florida courts could not find multiple successive awards of punitive damages for the same course of conduct to violate due process. Finally the court acknowledged the "potential for abuse" in this context but could think of no "fair and effective solution" to protect defendants from abuse. 638 So.2d at 505. The court suggested federal legislation as an alternative so that the problem could be handled on a nationwide basis rather than on a state by state basis.[6]

---

[6] Congress is in fact debating tort reform. It seems unlikely that any bill will be adopted and signed by the President within the very near future.

The record now before this Court presents the due process argument that the Supreme Court did not reach in ***Waters***. Not only the record before this Court,, but the published decisions throughout the West Reporter system demonstrate that OCF has been and continues to be assessed multi-millions of dollars in punitive damages for the same course of conduct. The numbers in the instant case are significant and a compilation of numbers from various sources shows perhaps an additional 50 to 70 million dollars in outstanding or paid awards of punitive damages. Even if the Florida Supreme Court felt that a "one bite" or "first comer" theory was inappropriate, OCF has long passed that stage in Florida and throughout the country'.

The long-standing rule in Florida is that punitive damages are intended to punish a wrongdoer and deter others from similar conduct, but without bankrupting a defendant. ***E.g., St. Regis Paper Co. vs. Watson,*** 428 So. 2d 243, 248 (Fla. 1983); ***Sutter vs. Hammond,*** 545 So. 2d 497, 498 (Fla., 4th DCA 1989); ***Hockensmith vs. Waxler,*** 524 So.2d 714,715 (Fla. 2d DCA 1988). One by one, most asbestos distributors and manufacturers have gone into bankruptcy because of multiple awards of both punitive and compensatory' damages. If Florida's public policy not to bankrupt defendants is to be given ant meaning, this Court should determine that fundamental fairness and due process require that a line be drawn to preclude further awards of punitive damages against OCF.[7]

---

[7] See, ***Honda Motor Co. vs. Oberg,*** 114 S. Ct. 2331(1994) (constitution imposes due process limits on the size of punitive damage awards).

It remains for this Court to take the initial step to address and to ameliorate the abuses recognized by the *Waters* court and the inherent unfairness recognized by this Court's *Baione* decision. Much of Appellees' argument may be summed up as "it hasn't been done before so it shouldn't be done in the future." The same could have been said in response to the first appellate argument seeking adoption of some form of comparative negligence as opposed to contributory negligence; the same response could have met a challenge to the "separate but equal"[8] doctrine prior to the issuance of *Brown vs. Board of Education,* 347 U.S. 483 (1954); and the same could certainly have been said when the first plaintiff attempted to convince the first court to adopt some type of strict liability theory.[9]

Multiple, substantial awards of punitive damages against OCF for the same course of conduct violate the Eighth and Fourteenth Amendments to the United States Constitution, as well as those provisions of the Florida Constitution discussed in the Initial Brief. This Court, as well as the Florida Supreme Court, have recognized the inherent prejudice and lack of fairness of repeated punishment for

---

[8] *Plessy vs. Ferguson,* 163 U.S. 537(1896)

[9] Indeed, the United States Supreme Court confirmed the importance of the constitutional issues raised here by OCF when it granted certiorari in *BMW of North America, Inc, vs. Gore,* 646 So.2d 619 (Ala. 1994), *cert. granted,* 115 S. Ct. 932 (1995). The issues raised by BMW include multiple awards of punitive damages based on the same course of conduct, as well as the excessiveness of the award of damage in that case.

conduct taking place many years in the past. The United States Supreme Court has indicated its concern with these same issues. The record before this Court will now allow this Court to answer the questions left unresolved by ***Browning-Ferris*** and ***Waters***. The Court should reverse the judgment for punitive damages and direct entry of judgment in favor of OCF's favor on that element of damages.

CONCLUSION

Based on the upon reason and authorities herein contained as well as those arguments in the Initial Brief, it is respectfully submitted that Based upon the foregoing reasons and authorities, it is respectfully submitted that the amended final judgment rendered in favor of Appellees and against OCF must be reversed. The trial court committed reversible error in refusing to apply the ***Fabre*** doctrine and committed prejudicial error in overruling OCF's objection to the use of the Thomas deposition and in refusing to continue the case for one day to allow OCF to present a critical witness. Additionally, the imposition of punitive damages against OCF violated well-established principles found in the United States and Florida Constitutions. OCF has been repeatedly punished for the same course of conduct in violation of the Excessive Fines Provision of the United States Constitution, the Due Process Clause of the United States Constitution and comparable provisions, including the double jeopardy clause, found in the Florida Constitution. The judgment for punitive damages must be reversed in its entirety.

CROSBY, SAAD, BEEBE & CRUMP
Post Office Drawer 850249
Mobile, Alabama 36685
-AND-
BERGER & CHAFETZ
Attorneys for OCF

Suite 1500
NationsBank Building
9350 South Dixie Highway
Miami, Florida 33156

By: s/
Steven R. Berger
Florida Bar No. 117402

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 8th day of June, 1995, to **John F. Venable, Esquire,** 205 South21A Hoover Boulevard, Suite 403, Tampa, Florida 33609.

CROSBY, SAAD, BEEBE & CRUMP
Post Office Drawer 850249
Mobile, Alabama 36685
-AND-
BERGER & CHAFETZ
Attorneys for OCF
Suite 1500
NationsBank Building
9350 South Dixie Highway
Miami, Florida 33156

By: s/_____
Steven R. Berger
Florida Bar No. 117402

APPENDIX

"768.73. Punitive damages; limitation

(1)(a) In any civil action based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability, or breach of warranty, and involving willful, wanton, or gross misconduct, the judgment for the total amount of punitive damages awarded to a claimant may not exceed three times the amount of compensatory damages awarded to each person entitled thereto by the trier of fact, except as provided in paragraph (b). However, this subsection does not apply to any class action.

(b) If any award for punitive damages exceeds the limitation specified in paragraph (a), the award is presumed to be excessive and the defendant is entitled to remittitur of the amount in excess of the limitation unless the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances which were presented to the trier of fact.

(c) This subsection is not intended to prohibit an appropriate court from exercising its jurisdiction under s.768.74 in determining the reasonableness of an award of punitive damages that is less than three times the amount of compensatory damages.

(2) In any civil action, an award of punitive damages is payable as follows:

(a) Sixty-five percent of the award is payable to the claimant.

(b) If the cause of action was based on personal injury or wrongful death, 35 percent of the award is payable to the Public Medical Assistance Trust Fund; otherwise, 35 percent of the award is payable to the General Revenue Fund.

(3) The clerk of the court shall transmit a copy of the jury verdict to the State Treasurer by certified mail. In the final judgment, the court shall order the percentages of the award, payable as provided in subsection (2).

(4) A settlement agreement entered into between the original parties to the action after a verdict has been returned must provide a proportionate share payable to the fund specified in paragraph (2)(b). For purposes of this subsection, a proportionate share is a 35-percent share of that percentage of the settlement amount which the punitive damages portion of the verdict bore to the total of the compensatory and punitive damages in the verdict.

(5) The Department of Banking and Finance shall collect or cause to be collected all payments due the state under this section. Such payments are made to the Comptroller and deposited in the appropriate fund specified in subsection (2).

(6) If the full amount of punitive damages awarded cannot be collected, the claimant and the other recipient designated pursuant to paragraph (2)(b) are each entitled to a proportional share of the punitive damages collected.

(7) Claimant's attorney's fees, if payable from the judgment, are, to the extent that they are based on the punitive damages, calculated based only on the portion of the judgment payable to the claimant as provided in subsection (2). Nothing herein limits the payment of attorney's fees

based upon the award of damages other than punitive damages.

(8) The jury may neither be instructed nor informed as to the provisions of this section.